STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GENERAL ELECTRIC COMPANY	:	DECISION DTA No. 800844
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 December 1, 1977 through February 28, 1981.	:	

Petitioner General Electric Company, c/o K. D. Holmes, 1 River Road, Building 5, 7th Floor East, Schenectady, New York 12345 filed an exception to the determination of the Administrative Law Judge issued on June 28, 1990 with respect to its 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 December 1, 1977 through February 28, 1981. Petitioner appeared by Hiscock & Barclay, Esqs. (E. Parker Brown, II, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs. Petitioner filed a reply brief as well. Oral argument, requested by petitioner, was held on September 5, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax upon the payments made by General Electric Company to Energy Systems Company of Arkansas for the latter's processing by incineration of PCB-contaminated oil waste.

II. If so, whether such taxation is in violation of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On September 12, 1983, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, General Electric Company ("GE"), in the amount of $52,973.08,plus interest, for a total amount due of $70,313.80 for the period December 1, 1977 through February 28, 1981.

Previously, GE, by its Manager-Tax Compliance, executed consents extending the period of limitation for assessment of sales and use taxes as follows:

Executed	Taxable Periods	Date to Assess Tax
12-17-80	9-1-77 through 2-28-78	6-20-81
6-2-81	12-1-77 through 2-28-81	12-20-81
12-11-81	12-1-77 through 2-28-81	6-20-82
6-2-82	12-1-77 through 5-31-79	9-20-82
9-14-82	12-1-77 through 8-31-79	12-20-82
12-15-82	12-1-77 through 2-28-81	3-20-83
3-9-83	12-1-77 through 2-28-81	6-20-83
6-15-83	12-1-77 through 2-28-81	9-20-83

By written stipulation entered into between the parties on the date of the hearing held herein, it was agreed that the issue with respect to sales tax assessed on charges for information services would be resolved by a determination to be issued in another matter, i.e., Matter of General Electric Information Services Co. (DTA# 801158), and it was further agreed as follows:

(a) GE withdrew that portion of its petition which pertained to sales tax assessed on information services;[1]

(b) the Division agreed to take no action on that portion of the assessment relating to information services until the final decision is issued in Matter of

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[1] Division of Taxation Exhibit "B" which is GE's letter of protest indicates that the amount of tax at issue relating to information services was $2,217.32 with the balance ($50,755.76) involving taxability of hazardous waste treatment and disposal.

General Electric Information Services Co.; and

(c) if the final decision in Matter of General Electric Information Services Co. results in a cancellation or adjustment of that assessment, appropriate adjustments will be made in the assessment at issue herein. If such decision sustains that assessment, GE will pay the amount of tax due, with interest, attributable to charges for information services which were assessed in the present matter.

In April 1990 the parties resolved the Matter of General Electric Information Services Co. (DTA #801158) without need of a decision of the Tax Appeals Tribunal.

As indicated above (footnote 1), GE agreed pursuant to the aforesaid stipulation that only the amount of $50,755.76, plus interest, remains at issue herein. However, in its brief submitted on September 29, 1989, GE conceded the taxability of invoices from Chemical Waste Management, Inc. and Cecos International, Inc. GE also conceded the taxability of invoices covering the transportation of wastes by Environmental Systems Company (formerly Energy Systems Company) ("ENSCO") from locations within New York State. Therefore, all that remains at issue herein is the imposition of sales tax by the Division of Taxation on charges by ENSCO to GE for the processing of hazardous wastes which occurred at ENSCO's facilities in Arkansas.[2]

ENSCO, a national corporation engaged in the treatment of hazardous wastes, is headquartered in Little Rock, Arkansas and has its primary treatment facility in El Dorado, Arkansas. At issue herein is ENSCO's services performed for GE with respect to oils

[2]In petitioner's Exhibit "1," GE submitted invoices from Chemical Waste Management, Inc., Cecos International, Inc. and ENSCO which, on an attached summary sheet, broke down the invoices into transportation charges and processing charges. Since GE has conceded the taxability of the invoices from Chemical Waste Management, Inc. and from Cecos International, Inc., these need not be further addressed. With respect to the invoices from ENSCO, GE concedes the taxability of the charges for transportation. On the summary sheet, GE indicates that the total of such transportation charges was in the sum of $111,000.00. The summary sheet indicates that the total of processing charges was in the sum of $483,423.50 ($250,953.50 paid to ENSCO and $232,470.00 paid to ENSCO's bank). It must be noted that a review of these invoices revealed that transportation charges were billed by ENSCO to GE in the amount of $111,400.00. With respect to the processing charges, an analysis of the invoices reveals total charges of $528,728.59. The auditor's workpapers indicate that total invoices from ENSCO (including transportation charges) were in the amount of $634,083.50. Subtracting transportation charges ($111,400.00) from the total results in processing charges totalling $522,683.50.

contaminated with PCBs (polychlorinated biphenyls). These contaminated oils originated in GE's capacitor plant in Hudson Falls, New York as well as in other locations throughout the State. Capacitors (originally called resistors) are devices designed to hold a set amount of electric charge until a certain voltage is reached. GE collected the PCB-contaminated waste in drums which meet U.S. Department of Transportation requirements for overland transportation.

ENSCO sent specially-equipped trucks from Arkansas to New York to pick up these wastes and transport them to Arkansas. ENSCO's drivers received special training in the carriage of hazardous materials over interstate highways. ENSCO obtained the necessary permits to transport these hazardous materials over interstate highways.

Once at ENSCO's El Dorado, Arkansas facility, samples from the drums were tested to verify PCB concentration, specific gravity and chlorine content. The oils were then placed in special holding tanks with other similar oils to obtain an optimum blend for incineration at a very high temperature. Both State (Arkansas) and Federal regulations governed storage and disposal of the wastes. As examples, the storage warehouse was required to have special containment features in case of spills, all piping was required to be above ground and tanks had to be made of carbon steel to certain specifications. After incineration, all ash and soot were collected and sent to a fully-permitted, third-party landfill under contract with ENSCO. Monitor wells were drilled around the site to ensure that no contamination entered into ground water.

ENSCO billed GE separately for transportation charges and for treatment of its hazardous wastes. The transportation charge, computed at a flat dollar rate, was a fee for removal and transportation of the wastes from GE's facilities to Arkansas. A separate charge was billed to GE for the treatment of the PCB-contaminated oils by incineration. This charge included receiving and storage of the wastes at ENSCO's El Dorado, Arkansas facility, recordkeeping with respect to the wastes and the minimal cost of transporting the wastes from the incinerator complex to the landfill.

OPINION

In his determination, the Administrative Law Judge held that the service performed by ENSCO for petitioner was an integrated waste removal service and, thus, he sustained the imposition of sales tax pursuant to Tax Law § 1105(c)(5). Moreover, the Administrative Law Judge rejected petitioner's argument that, under Complete Auto Transit v. Brady (430 US 274, reh denied 430 US 976), the taxation of ENSCO's hazardous waste treatment and processing services is violative of the Commerce Clause of the United States Constitution. In reaching this conclusion, the Administrative Law Judge reasoned that sufficient nexus existed between New York State and the waste removal service and that the tax is related to services provided by New York so that it can validly impose a sales tax upon the activity at issue herein. Further, the Administrative Law Judge noted that petitioner did not raise issue with any of the other criteria set forth in Complete Auto, i.e., whether the tax is fairly apportioned or whether it discriminates against interstate commerce.

On exception, petitioner contends that charges by ENSCO to petitioner for treatment of hazardous wastes were charges for the processing of tangible personal property entirely outside of New York State. Petitioner argues that the charges for such treatment were billed on separate invoices and, because such treatment does not include any New York activity, such charges are beyond the reach of New York State's sales tax. Secondly, petitioner asserts that New York's taxation of out-of-state waste processing, as if it were part of a maintenance function performed in New York, violates the United States Constitution.

In response, the Division of Taxation (hereinafter the "Division") argues that the service provided by ENSCO was an integrated waste removal service and was properly taxed pursuant to Tax Law § 1105(c)(5). The Division states that even though ENSCO billed petitioner using separate invoices (one invoice contained the charge for the processing of the hazardous waste and the second invoice contained the charge for transporting such waste from New York to Arkansas), the service was still a unitary transaction and it cannot be inferred that separate transactions took place.

Secondly, the Division argues that the tax is imposed upon a waste removal service which is

a local activity. The Division argues that the tax imposed is constitutional in that sufficient nexus exists between the service performed and New York State, that the tax is fairly apportioned, that the tax is not discriminatory and that such tax is fairly related to services provided by New York State. Lastly, the Division contends that petitioner has not sustained its burden of proof pursuant to Tax Law § 1132(c) of establishing that the service at issue was not taxable.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

Petitioner herein pays ENSCO to pick up its hazardous waste materials in New York and to transport these materials to Arkansas so that the waste may be properly disposed of by incineration. Petitioner does not contest the taxability of the charge for the pick up and transportation of the waste, but it does argue that the actual incineration of the materials, which takes place wholly in Arkansas, is a separate service from the transportation service of such materials. Petitioner argues that the charges for the treatment of the waste were charges for processing tangible personal property entirely outside of New York. Petitioner points to the fact that it is billed separately for the two transactions as proof that it is receiving two separate and distinct services from ENSCO. We disagree.

It has been held that disposal of refuse and the service of picking up and delivering the refuse is one integrated service (Matter of Cecos Intl. v. State Tax Commn., 126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811; Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). In Cecos, the petitioner operated a landfill and waste treatment facility in Niagara Falls, New York. The petitioner disposed of solid waste by burying it in its landfill. It had to "treat" liquid waste prior to its disposal. In some cases, petitioner arranged transportation of the waste from the customer's site to its facility. In other cases, the petitioner had no involvement in transportation but merely disposed of the waste. The petitioner billed its customers separately for the transportation costs and the disposal costs. The petitioner asserted that its transportation and disposal charges were not taxable.

The Court "determined that petitioner's freight and disposal charges constituted the taxable maintenance service of trash removal from buildings (cites omitted). By arranging for the hauling of the waste to its facilities . . . petitioner has performed this taxable service and cannot, by merely separating the disposal and freight costs on its invoices, render the freight portion of the charges nontaxable" (Matter of Cecos Intl. v. State Tax Commn., supra, affd 71 NY2d 934, 936). In short, the disposal of the waste, whether by burying or treatment, was an integral part of the waste removal service.

Petitioner's assertion herein that processing of waste is not an integral part of the service of trash removal is apparently based on the court's conclusion that the processing of waste is a taxable transaction under section 1105(c)(2) (Matter of Cecos Intl. v. State Tax Commn., supra, at 937). Petitioner fails to place that discussion in the context of the facts in Cecos, namely, that the petitioner had transactions where it charged customers only for the processing of waste brought to its facilities by the customers and asserted that such charges were not taxable. In this context, the court held such charges taxable as processing under section 1105(c)(2). Therefore, we conclude that petitioner was purchasing an integrated waste removal service.

We deal next with the issue of whether this application of the sales tax on the entire receipt for this transaction violates the Commerce Clause of the United States Constitution. We stress that we are not deciding the constitutionality of the statute on its face (cf., Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988 [where we held that we do not have jurisdiction to address a challenge to the constitutionality of a statute on its face]).

Both petitioner and the Division rely on Complete Auto Transit v. Brady (supra) which sets forth the four criteria that must be met in order for a tax on interstate commerce to be constitutional. A tax will be held constitutional if: (1) the activity is sufficiently connected to the State to justify a tax; (2) the tax is fairly related to benefits provided the taxpayer; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly apportioned (Complete Auto Transit v. Brady, supra, at 287).

Petitioner argues that the tax imposed on the processing of its waste materials is

unconstitutional for two reasons. First, petitioner alleges that the tax is unconstitutional because the activity does not have sufficient nexus with New York State, since the processing is completed wholly within Arkansas. This position is without merit.

As we have concluded above, the service being performed was an integrated waste removal service that occurred, at least partly, within New York State. Tax Law § 1105(c)(5) imposes a sales tax upon the receipts for services of maintaining, servicing or repairing real property which includes the service of waste removal (see, 20 NYCRR 527.7[b][2]). Tax Law § 1133(b) provides that the customer will be liable for the payment of tax where the person required to collect tax has failed to do so. Thus, petitioner, who has contracted for the integrated waste removal service which occurred within New York State, is liable for the sales tax on such transaction. Therefore, we conclude that since the activity is performed within New York State and because petitioner has a significant presence in New York State, there exists sufficient nexus with the State to support the tax.

Secondly, petitioner argues that the tax imposed herein is unconstitutional because it is not fairly apportioned. Petitioner contends that since the incineration itself is completed in Arkansas, then New York's imposition of sales tax on the entire receipt for the waste removal service is clearly not apportioned and, further, creates the possibility of double taxation.

We reverse the Administrative Law Judge and conclude that the sales tax imposed upon petitioner herein is not fairly apportioned.

The Supreme Court stated in Goldberg v. Sweet that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction" (Goldberg v. Sweet, 488 US 252, 260-261). The first test to determine whether a tax is fairly apportioned is internal consistency. In other words, the tax must be structured so that, if applied by every jurisdiction, no multiple taxation would result (Goldberg v. Sweet, supra, at 261; Container Corp. of Am. v. Franchise Tax Bd., 463 US 159, 169). The second requirement is what is termed external consistency. The external consistency test determines whether the State has taxed only that portion of the revenues from the interstate activity which

reasonably reflects the in-state component of the activity being taxed (Goldberg v. Sweet, supra, at 262; Container Corp. of Am. v. Franchise Tax Bd., supra, at 169).

We will begin by first addressing the internal consistency test. The Division argues that:

> "Petitioner does not contend that there is a tax levied in Arkansas on transportation of goods into the State, or treatment of waste within the State. Therefore, we need not address whether a credit is available under the New York State Tax Law for such a tax (an element in the Goldberg case)" (Division's brief, p. 8).

The Division misinterprets Goldberg. As stated above, the Court in Goldberg stated that to be internally consistent, the tax must be structured so that if an identical tax were to be imposed in another state, no multiple taxation would result (Goldberg v. Sweet, supra, at 261). Therefore, Arkansas does not need to have an identical tax, but rather, the mere possibility of it imposing an identical tax cannot result in multiple taxation.

In Matter of Cecos Intl. v. State Tax Commn. (supra), the Appellate Division held that a landfill operator, who hired independent haulers to transport waste to his landfill, was required to collect tax on both the transportation charges and the charges for treatment and disposal of the waste because the charges were for an integrated waste removal service. If we hypothesized that Arkansas had a sales tax statute identical to New York's, then Arkansas could also impose a tax on both the transportation and waste treatment charges paid by petitioner. This tax would be imposed on the theory that transporting the waste to the Arkansas treatment plant was, as in Cecos, an integral part of the waste removal service. At the very least, Arkansas would tax the waste treatment as the processing of tangible personal property (see, Matter of Cecos Intl. v. State Tax Commn., supra, 511 NYS2d 174, 176).

Not only is there a substantial risk of multiple taxation presented here, but unlike the tax in Goldberg, the New York Tax Law does not contain a credit provision to avoid this result. Tax Law § 1118(7)(a) does provide an exemption from use tax where a taxpayer was required to pay a sales tax in another jurisdiction; however, it does not appear that this use tax exemption would avoid multiple taxation where the service was subject to sales tax in New York and a sales tax in another state. Therefore, since there exists the possibility of multiple taxation and there is no

credit provision to avoid such taxation, we conclude that the sales tax at issue herein fails the internal consistency test.

The second part of determining whether a tax is fairly apportioned is to determine if the tax is externally consistent. In other words, whether New York has taxed a portion of the total charges for the interstate activity which reasonably reflects the New York component of the waste removal service.

In Goldberg, the Court found that the Illinois statute imposing tax on the gross charge of interstate telecommunications was fairly apportioned (Goldberg v. Sweet, supra, at 265). In applying what it characterized as essentially a practical inquiry, the Court reasoned that the telecommunications involved the intangible movement of electronic impulses through computerized networks and that an apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers (Goldberg v. Sweet, supra, at 264-265). The Court found the Illinois method of taxation "a realistic legislative solution to the technology of the present-day telecommunications industry" (Goldberg v. Sweet, supra, at 265). The Court distinguished its case from those cases which have applied apportionment formulas based upon the miles a bus, train, or truck have travelled within the taxing state (Goldberg v. Sweet, supra, at 264).

In our case, there does exist a practical way to apportion the New York State tax to a part of the entire service. The apportionment could be based on miles travelled within New York State or based upon the charges for the transportation portion of the entire charge. Therefore, we conclude that based on the case law, and the type of service that is involved, a tax on the entire charge for the waste removal service, without any apportionment, fails the external consistency test, and such tax is not fairly apportioned.

We note that although the tax involved in Goldberg was a state excise tax, the reasoning used by the Court in its opinion is applicable herein. In its analysis, the Court discussed the similarity between the tax at issue and a sales tax (Goldberg v. Sweet, supra, at 262). A sales tax, as a transactional tax, is typically based upon an activity that occurs entirely within one

state and that no other state would have jurisdiction to tax (see, McGoldrick v. Berwind-White Coal Min. Co., 309 US 33, 58). Our facts are similar to the facts in Goldberg in that an activity is occurring in two states and each state has possible jurisdiction to tax the activity. The crucial difference in our present case is that New York does not provide any type of credit for sales tax paid on an integrated removal service which could be taxed by another jurisdiction. For this reason, our case demands an opposite result than that reached by the Court in Goldberg.

Therefore, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of General Electric Company is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of General Electric Company is granted to the extent that the tax imposed on the processing charges of $522,683.50 is cancelled; and

4. The Division of Taxation is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due in accordance with paragraph "3" above but such Notice, as modified per the agreement of the parties, is otherwise sustained.

DATED: Troy, New York
March 5, 1992

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner