STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AUBURN STEEL COMPANY, 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 December 1, 1981 through November 30, 1984.	:	

Petitioner Auburn Steel Company, Inc., Quarry Road, P.O. Box 2008, Auburn, New York 13021, filed an exception to the determination of the Administrative Law Judge issued on November 30, 1989 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, 1981 through November 30, 1984 (File No. 804881). Petitioner appeared by Coudert Brothers (E.A. Dominianni, Esq. and Richard A. Horodeck, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter in lieu of a brief. Oral argument, at the request of petitioner, was held on March 14, 1990.

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

ISSUE

Whether charges for the removal of particulate dust from petitioner's steel mill and the transportation of such dust to a disposal site are subject to tax under Tax Law § 1105(c)(5) as trash removal services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. The Administrative Law Judge's findings of fact are set forth below.

Petitioner, Auburn Steel Company, Inc., a Delaware Corporation, operates a steel mill in Auburn, New York.

The plant was built during 1973 and 1974 and was placed in operation in l975. The cost of the plant was $32,000.000.00. More than half of the cost, $l8,500,000.00, was derived from revenue bonds issued by AuburnIndustrial Development Authority ("AIDA"). The remainder was derived from subordinated loans.

AIDA is an agency established by the City of Auburn to encourage businesses to locate in the area. It is an industrial development authority exempt from sales and use taxes under the laws of the State of New York.

The AIDA bonds were sold to institutional investors such as John Hancock Life Insurance Company, American Bankers Life Insurance Company and The Bank of New York. There were originally three series of bonds: about $8,500,000.00 remains outstanding on Series A and Series B, while Series C has been paid. Series A pays tax exempt interest, while Series B pays non-tax exempt interest.

Petitioner pays the principal and interest on the bonds and also makes a payment to AIDA in lieu of taxes.

The land, buildings and plant equipment are owned by AIDA and are leased to petitioner. Under the terms of the lease, petitioner is required to repair and maintain the facilities on behalf of AIDA.

The remaining bonds mature in 1995. When they are fully paid, the land, buildings and equipment will become the property of petitioner.

The plant utilizes scrap steel, such as reclaimed automobiles, industrial scrap, etc. and melts it in a 70-ton electric furnace to form 5 inch square billets, which are cut into pieces 10 to 30 feet long. While petitioner occasionally sells billets, they are generally used by petitioner to make finished products such as angles, channels and concrete reinforcing bars.

Petitioner has approximately 310 employees, including 4 outside salesmen who work out of their homes. Petitioner has no branch office or plant aside from the Auburn location.

Gases and particulate dust are generated in the course of melting down the scrap steel. The gases and dust are collected in certain equipment called the "baghouse". The baghouse contains numerous cloth filters which trap the dust. The filters are shaken approximately every 20 minutes and dust from the filters falls to conveyer belts. The conveyer belts deposit the dust in two specialized storage bins called "roll-offs", which are sealable, covered receptacles approximately 8 feet by 22 feet, equipped with hatches. The baghouse and roll-offs comprise an enclosed system which prevents the escape of the dust.

Personnel employed by Auburn Container Corporation ("ACC") visit the plant each day and inspect the roll-offs. The roll-offs are removed and weighed. If a roll-off is found to be full, it is replaced by a spare empty roll-off. If it is not full, it is repositioned at the conveyers. Two days of mill operations result in the filling of each roll-off, with one of the two roll-offs removed and replaced each day. Full roll-offs are kept in a roll-off storage area approximately 100 feet from the baghouse.

ACC picks up the full containers and transports them to a secure processing or disposal site. It then returns the empty roll-offs to the plant. ACC never takes title to the dust.

Prior to May 19, 1980, baghouse dust was not deemed hazardous waste and was not required to be kept in sealable containers. Accordingly, it was collected in non-sealable containers and dumped at the local landfill. Federal environmental regulations effective on May 19, 1980 designated the dust as hazardous industrial waste and required that it be kept in sealed containers and be disposed of at a specially designated hazardous waste reclaiming facility or disposal site.[1]

Between November 1980 and February 1984, the dust was taken by ACC to IU Conversion Systems, Inc. ("IU") in Honeybrook, Pennsylvania. IU mixed the dust with fly ash from utility plants and with various other chemicals, liquids and cement and the mixture was deposited in a

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[1]See 40 CFR 261.3.

secure landfill site, where it set up as a concrete-like material. The dust absorbed the acids and liquids and encapsulated the fly ash.

Effective February 1984, petitioner shipped the dust to New Jersey Zinc Co. in Palmerton, Pennsylvania. New Jersey Zinc Co. accepted ownership of the dust at its plant scales.

In addition to servicing the roll-offs and transferring the dust to the out-of-state sites, ACC provided normal trash collection services for petitioner approximately three times per week.

Upon audit, the auditor determined that petitioner had not paid sales tax to ACC for servicing the roll-offs and transporting the dust. The auditor treated these services as taxable trash removal services. The auditor also held certain purchases of tangible personal property subject to use tax. These purchases had been made to refurbish the plant due to contamination by radioactive hospital scrap. Use taxes on recurring expenses were also determined.

Petitioner executed four separate consents extending the period of limitation for assessment for the periods at issue to September 20, 1986. On September 19, 1986, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for $211,129.17 in additional sales and use taxes due, plus interest, for the period December 1, 1981 through November 30, 1984.

Pursuant to a Bureau of Conciliation and Mediation Services conference, the assessment was reduced by cancellation of use tax of $167,559.35 on the purchases of tangible personal property made to refurbish the plant, as it was shown that said purchases were made on behalf of AIDA. Petitioner paid $3,092.95 representing the agreed portion of the tax due per audit of $691.55, plus interest of $2,401.40[2] on October 6, 1986. The amount remaining at issue is $42,878.27 in tax on $612,546.96 paid to ACC for services pertaining to the removal of the particulate dust.

Petitioner's purchase orders to IU for the period February through December 1981 show that the cost of processing and disposal of baghouse dust was $33.00 per ton from February 1,

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[2]These figures are from the Report of Tax Conference and Form TA-52 (Exhibit "H"). The field audit report (Exhibit "G") shows $3,100.32 paid, representing tax of $691.55 and interest of $2,408.77.

1981 through March 31, 1981, $34.97 per ton from April 1, 1981 through September 30, 1981, $35.34 per ton from October 1, 1981 through November 30, 1981 and $35.20 per ton from December 1, 1981 through December 31, 1983. Effective October 1, 1983 a new Pennsylvania facility closing fee of $2.13 per ton resulted in a total cost of $37.33 per ton.

Petitioner's purchase orders to New Jersey Zinc Co. for the period March 1984 through March 22, 1985 show that the price "to cover the cost of beneficial recycling of baghouse dust" was $35.00 per ton, with an additional charge of $3.00 per ton for each percentage of zinc content below 20 percent.

With respect to payments to ACC for transporting the dust, purchase orders in the record show the following:

(a) The blanket purchase order for 1981 shows that effective March 1981 petitioner paid ACC $675.00 per trip for transporting dust containers from the mill to the IU location in Honeybrook, Pennsylvania. A $1,000.00 per month charge was also imposed for rental of the special trailer obtained by ACC for such hauling. The rental charge was to be paid "when applicable".[3] Rental was to apply for the period November 19, 1980 through February 19, 1981, with no rental for March 1981.

(b) The blanket purchase order for 1984-1985 shows that ACC's charge "for the transporting of dust containers, as required, from our [petitioner's] plant to New Jersey Zinc Co. in Palmerton, PA" was $620.00 per trip. This amount was said to also "include rental cost for special trailer obtained by Auburn Container for this purpose."

On October 12, 1983, the Board of Directors of AIDA passed a resolution approving certain purchases of buildings, machinery and equipment by petitioner as agent of AIDA. The resolution reads as follows:

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[3]Although it is not entirely clear, the trailer rental charge appears to have been applicable only for the period prior to March l981.

"AUBURN INDUSTRIAL
DEVELOPMENT AUTHORITY

RESOLUTION APPROVING PROPOSED PURCHASES OF BUILDINGS, MACHINERY AND EQUIPMENT BY AUBURN STEEL COMPANY, INC. AS AGENT OF AUBURN INDUSTRIAL DEVELOPMENT AUTHORITY IN CONNECTION WITH PROJECT

Whereas Auburn Steel Company, Inc. (Company), the lessee of the Project, has offered to purchase buildings, machinery and equipment as agent of the Auburn Industrial Development Authority (AIDA), and

Whereas such buildings, machinery and equipment will on purchase become part of the property of AIDA and of the Project as defined in the Indenture and lease, and

Whereas the Company has offered to perform such services as agent for AIDA at no cost to AIDA, and the Company has agreed to (1) be solely responsible for the payment of any and all costs in connection with such purchases, and to make all of such payments directly to the vendors, sellers, shippers or any other persons making any claims in connection therewith, and (2) to save harmless and defend AIDA from any and all costs or liabilities in connection with such purchases, and

Whereas the proposed action is deemed to be a Type II action under SEQR and not to have a significant effect on the environment,

NOW THEREFORE:

Be It Resolved that the proposed action herein is decreed to be a Type II action under SEQR and not to have a significant effect on the environment, and

Be It Resolved that the Auburn Industrial Development Authority (AIDA) hereby approves the proposed purchases of buildings, machinery and equipment by Auburn Steel Company, Inc. (Company) as Agent of AIDA in connection with the Project, and

Be It Further Resolved that all such purchases shall be made in the manner and subject to then [sic] all of the conditions and obligations set forth above and as represented to AIDA, and

Be It Further Resolved that the Company by any exercise of the authority as agent extended authorized [sic] by this Resolution (1) shall be deemed to have accepted all of the conditions set forth herein, and (2) shall make all payments, and save harmless and defend AIDA from any and all costs or liabilities in connection therewith."

After the period at issue, certain purchase orders were stamped with the following legend:

> "This purchase order is entered by Auburn Steel Co., Inc. as agent for Auburn Industrial Development Authority, a governmental agency. All invoices, packing lists and correspondence for material and services on the purchase order must be addressed to:
>
> Auburn Steel Company, Inc.
> As Agent for
> Auburn Industrial Development Authority
> P.O. Box 2008
> Quarry Road
> Auburn, New York 13021"

The two purchase orders in the record refer to erection of a 16 foot by 20 foot by 8 foot building for a gas meter house (purchase order dated October 5, 1988) and a transformer (purchase order dated February 19, 1988). There is nothing in the record to indicate that the legend was stamped on purchase orders during the audit period. The purchase orders to ACC did not bear such stamped legend.[4]

Of the purchase orders in evidence, those pertaining to the rental of rubbish containers and the dumping thereof indicate 7% sales tax; those relating to the rental of dust containers indicate that the transactions were New York State tax exempt, as do those pertaining to the charges for transporting dust to IU's disposal site.[5] The purchase orders for shipment to New Jersey Zinc Co. bear no reference to sales tax.

Petitioner claims as follows:

(a) That the particulate dust is tangible personal property with a value and is not worthless "trash", the removal of which constitutes a taxable service under Tax Law § 1105(c)(5).

(b) That even if the dust is deemed to be trash for purposes of sales and use tax, the services performed by Auburn Container Corporation are exempt from tax under either Tax Law § 1115(a)(12) or Tax Law § 1105-B(b).

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[4]Transcript of hearing, page 76.

[5]The purchase orders for the gas meter house and the transformer are also shown to be tax exempt. These items, however, are not at issue.

(c) That even if the dust is deemed to be trash for purposes of sales and use tax, all actions taken by petitioner in contracting for disposal of the dust were done for it as the agent of AIDA and thus exempt from tax under Tax Law § 1116(a)(1).

Petitioner submitted 28 proposed findings of fact.

(a) Proposed findings 1 through 19, 21 through 23, 25, 27 and 28 are accepted.

(b) Proposed finding 24 is rejected to the extent that it provides that New Jersey Zinc Co. agreed to pay petitioner a rebate. Exhibit 8 clearly shows that a surcharge would be made if the zinc content of the dust was below 20 percent.

(c) Proposed findings 20 and 26 are rejected, as there is insufficient data in the record to show the exact breakdown of the $42,878.27 in tax at issue.[6]

OPINION

The Administrative Law Judge found that the particulate dust created by petitioner's manufacturing process was "trash" within the meaning of Tax Law § 1105(c)(5). He concluded that the services performed by Auburn Container Corporation of moving the roll-off containers containing the dust within the steel mill and transporting the dust to a disposal site were taxable trash removal services pursuant to Tax Law § 1105(c)(5). In addition, the Administrative Law Judge found that the services were not exempt from tax under Tax Law § 1115(a)(12) as machinery or equipment used in the production of tangible personal property, or under Tax Law § 1105-B(b) as maintenance of equipment used in the production of tangible personal property. The Administrative Law Judge also found that petitioner's purchases of services for the removal of the dust were not made as an agent for an exempt organization and were not exempt from tax under Tax Law § 1116(a)(1).

On exception, petitioner contests only the portions of the Administrative Law Judge's determination which found that the particulate dust was trash and that the service of removing the dust from the mill and transporting it to the disposal sites was a taxable service. Petitioner

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[6]Petitioner shows the tax at issue as $42,878.09. This is because petitioner recorded the cancelled portion of the assessment as $167,559.53 (Exhibit 1) rather than $167,559.35.

also asserts that even if the dust is considered to be trash, the charges attributable to the weighing and rotation of the roll-off containers within the mill would be exempt from tax as maintenance of equipment used in the production of tangible personal property or as interior cleaning and maintenance services. In addition, petitioner argues that transportation to the disposal sites, particularly the site which charged a higher rate if the dust contained less than a certain percentage of zinc, should not be considered "trash removal" because the dust had some value to the disposal sites.

The Division of Taxation requests that the determination of the Administrative Law Judge be affirmed arguing that the dust was trash and the service petitioner contracted for was a taxable trash removal service.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1105(c)(5) provides, in pertinent part, that receipts from every sale, except for resale, of the following services are subject to sales tax:

> "Maintaining, 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 as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings."

Petitioner makes two arguments in support of its position that the dust was not trash: (1) that because the dust was a waste or by-product created as a result of the production process, it was not the kind of waste that the Legislature had in mind when it sought to tax the service of trash removal, and (2) that the dust was not trash because it had some economic value to the disposal site.

We agree with the Administrative Law Judge that the particulate dust was "trash" within the meaning of Tax Law § 1105(c)(5). With regard to petitioner's first argument, the statute

makes no specific provision for different tax treatments based upon the origin of the trash or the type of waste. The interpretation of the statutory language sought by petitioner has been rejected by the New York courts which have determined that Tax Law § 1105(c)(5) applies to charges for the transportation of production waste products to disposal sites (Matter of Rochester Gas & Elec. Corp. v. State Tax Commn., 128 AD2d 238, 516 NYS2d 341 [3d Dept 1987], affd 71 NY2d 931, 528 NYS2d 810 [1988]; Matter of Cecos Intl., Inc. v. State Tax Commn., 126 AD2d 884, 511 NYS2d 174 [3d Dept 1987], affd 71 NY2d 934, 528 NYS2d 811 [1988]; see also, Matter of Tonowanda Tank Transport Service, Inc., Tax Appeals Tribunal, September 14, 1989). The waste products in the Rochester, Cecos, and Tonowanda cases were similar to the particulate dust here in that they were created as part of the production process and were the types of waste for which special environmental rules for disposal applied.

With regard to petitioner's second argument, we do not agree that the dust ceases to be "trash" because some portion of it may have had value to the disposal site. Petitioner has failed to establish that the dust had value. Employees of petitioner testified about the operations of the disposal sites. According to their testimony, the value of the dust to one disposal site (IU Conversion Systems, Inc.) was that when mixed with other hazardous materials it helped to form the structure in which the materials were ultimately disposed. The other disposal site (New Jersey Zinc) apparently reclaimed the zinc found in some of the dust for some other purpose. There is no evidence in the record of the actual economic value of the dust to the disposal sites. Petitioner argues that a measure of the dust's value is that its disposal costs would have been more if it had used a different disposal solution. However, the record contains no evidence to support this argument. The disposal charges for the two different disposal sites used during the audit period were not on their face substantially different. The disposal contract with New Jersey Zinc required petitioner to pay in addition to a flat charge per ton of dust, an additional amount of $3.00 per ton for each percentage of zinc content in the dust below 20 percent. The record contains no evidence of how much of the dust transported during the audit period was subject to the additional charges. In this case, it is clear that petitioner was not selling the dust to the

disposal sites but was paying the disposal sites to take the dust. Thus, the charges for transporting the dust are properly classified as trash removal services and not as transportation charges for transporting a useful product from one location to another. This conclusion is in accord with that in Rochester, where even though a small portion of the fly ash was actually sold, charges for the transportation of the fly ash were determined to be taxable because the fly ash was a waste product with little or no economic value (Matter of Rochester Gas & Elec. Corp., supra, 528 NYS2d 810, 811).

Petitioner argues that even if the dust is considered to be trash, charges for the rotation and replacement of the roll-off containers and the movement of the containers to a storage area within the mill are exempt from tax pursuant to Tax Law § 1105-B(b) as maintenance services of machinery or equipment used in the production of tangible personal property or excluded from the tax imposed by Tax Law § 1105(b)(5) as interior cleaning and maintenance services. Petitioner characterizes the handling of the roll-off containers within the mill as a separate service that was part of the production process because it took place in the mill and was directly related to the baghouse. Petitioner also argues that it is a separate service because petitioner was charged separately for this service. We do not agree that these factors make this service nontaxable. Taxable trash removal services are not limited to activities which take place outside of the taxpayer's premises (see, 20 NYCRR 527[b][2]). The roll-off containers were essentially trash barrels for the dust which were moved for the petitioner by Auburn Container Corporation. No interior cleaning or maintenance within the meaning of Tax Law § 1105(c)(5) took place. In our view, the facts here support the Administrative Law Judge's conclusion that the movement of the roll-off containers within the mill was part of the process of removing the dust from petitioner's property and are properly taxable as trash removal services (see, Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552 [3d Dept 1985]; Matter of Rochester Gas & Elec. Corp., supra; Matter of Cecos Intl., Inc., supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that;

1. The exception of petitioner, Auburn Steel Company, Inc., is denied;

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

3. The petition of Auburn Steel Company, Inc. is denied in all respects; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 19, 1986, as reduced pursuant to the Bureau of Conciliation and Mediation Services conference, is sustained.

DATED: Troy, New York
September 13, 1990

/s/John P. Dugan
John P. Dugan
President

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

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