STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WASTE MANAGEMENT OF NEW YORK, INC.	:	DECISION DTA No. 805791
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 September 1, 1983 through August 31, 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 22, 1990 with respect to the petition of Waste Management of New York, Inc., 101 Ontario Street, Rochester, New York 14445 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 September 1, 1983 through August 31, 1986 (File No. 805791). Petitioner appeared by Moot & Sprague (Arnold N. Zelman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Briefs were submitted by both parties. Oral argument was heard at the request of the Division of Taxation on October 17, 1990.

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

ISSUES

I. Whether petitioner is entitled to the exclusion provided in Tax Law § 1101(b)(4)(i)(B).

II. Whether petitioner is engaged in the rental of the subject equipment separate and apart from its waste removal service.

FINDINGS OF FACT

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

On April 16, 1987, following an audit, the Division of Taxation issued to petitioner, Waste Management of New York, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $58,120.35 in tax due, plus interest, for the period September 1, 1983 through August 31, 1986.

Petitioner is in the business of waste removal. It is organized into several divisions, two of which are relevant herein -- Waste Management of Rochester, 101 Ontario Street, East Rochester, New York and Downing Container Service, 191 Ganson Street, Buffalo, New York.

The assessment herein results from a Division determination that petitioner improperly failed to pay sales and use taxes on its purchase, during the audit period, of containers, compactors, repair parts and repair services for containers and compactors, and portable toilets. The Division's assessment was premised upon its position that the aforementioned purchases were used by petitioner in connection with taxable services. The computation of the assessment is not in dispute.

The assessment may be categorized as follows:

	Tax Assessed
Container Purchases	$28,480.56
Compactor Purchases	12,019.73
Port-O-Let Purchases	3,211.07
Container and Compactor Repair Parts Purchases	13,066.57
Outside Service Purchases	171.26
Container Rental	313.77
Landfill Repair Expenses[1]	857.39
Total	$58,120.35

[1] At hearing, petitioner conceded its liability with respect to the landfill repair expenses component of the assessment.

Containers and Compactors

Petitioner's business primarily involves waste removal using large containers and compactors, bulk pickups and residential (curbside) pickups. With respect to waste removal using containers and compactors, petitioner's business, with few exceptions, consisted of supplying industrial and commercial customers with a container or a compactor for the collection of refuse and periodically removing this refuse from the customer's premises. Petitioner entered into standard service agreement contracts with its customers setting forth the specific obligations of the parties, including the type, size and quantity of containers or compactors to be provided by petitioner and the frequency of refuse removal by petitioner from the customer's premises. The standard service agreement was for a minimum of one year with an automatic annual renewal provision.

The containers purchased by petitioner during the audit period fall into two general categories. First are front-loading containers with capacities ranging from 2 to 10 cubic yards. These containers are unloaded by specially equipped trucks which empty the contents of the container directly into the truck. Petitioner also purchased large, open-top containers, called roll-offs, with capacities ranging from 15 to 40 cubic yards. Roll-offs are emptied using a truck which lifts the roll-off container onto its chassis, travels to a disposal site, unloads the waste and returns the empty container to its previous location.

Petitioner also purchased compactors during the audit period. This equipment, which uses hydraulics to compact trash, is used in conjunction with a roll-off type of container. The compactor is anchored to the ground and the container is attached to it. To empty the container, it is decoupled from the compactor and removed to a disposal site in the same manner as a roll-off.

Pursuant to the service agreements, petitioner supplied its customers with the container or compactor best suited to the particular customer's needs. Petitioner subsequently removed the trash accumulated in the containers by the customer using the methods and equipment described

above. The frequency with which petitioner removed a customer's trash was also based upon the particular customer's needs.

Among the terms contained in petitioner's standard service agreements were the following:

> "CUSTOMER'S DUTIES AND LIABILITY. The equipment provided by Contractor [petitioner] is done so for Contractor's convenience in providing the service called for by this Agreement.
>
> Customer shall be responsible for the cleanliness and safekeeping of the equipment.
>
> Customer shall not make any alterations or improvements to the equipment without the prior written consent of the Contractor.
>
> Customer shall not overload the equipment, nor use it for incineration purposes, and shall be liable to Contractor for loss or damage in excess of reasonable wear and tear.
>
> * * *
>
> All equipment furnished by the Contractor for use by the Customer which the Customer has not purchased, shall remain the property of the Contractor and the Customer shall have no right, title or interest in equipment.
>
> Customer agrees to defend, hold harmless and indemnify Contractor against all claims, lawsuits and any other liability of injury to persons or damage to property or the environment connected with the use of the equipment by the Customer or breach of any warranty by the Customer."

During the audit period, petitioner had slightly different billing practices with respect to its containers and compactors. For compactors, petitioner's service agreements and invoices separately stated a "compactor use charge" and a charge per haul to dispose of the customer's accumulated waste. For containers, petitioner sometimes separately stated a "container use charge" and a charge per haul on its service agreements and invoices. Petitioner also sometimes listed one lump sum on its container service agreements and invoices. In the case of petitioner's Downing Container division, this inconsistency with respect to containers resulted from either a desire by the customer to be billed in a lump sum or a desire by petitioner to make its invoices simpler by billing one amount rather than two separate charges. In the case of petitioner's East Rochester division, certain of its government contracts required that bids for work be submitted

at a single flat rate. Such customers were therefore billed at a single rate. Petitioner introduced one such bid proposal into the record herein (Exhibit "12"). While the bid proposal sets forth one flat fee for "Refuse Container Service", it also indicates, under a heading encaptioned "Location and Service Requirements", that petitioner will "rent" various containers at various locations. The proposal also indicates that, with respect to the scope of work at a particular location, "the cost of renting the containers throughout the term shall be included in the bid price."

With respect to compactors, petitioner's East Rochester division also required the execution of a standard, five-year "Equipment Lease Agreement" calling for monthly "rental payments". The "Equipment Lease Agreement" provided that the entire agreement was conditional upon the customer/lessee's utilization of petitioner/lessor's hauling and disposal services exclusively during the term of the agreement. Petitioner's requirement that its customers execute such five-year agreements was premised upon the high cost to petitioner of purchasing such equipment.

During the audit period, petitioner also incurred costs in repairing and maintaining its containers and compactors then located on customers' premises. Generally, petitioner purchased repair parts and made the repairs using its own employees. Occasionally, petitioner hired an outside contractor to make the repairs. The cost of such repair parts and services resulted in the repair parts purchases and outside services purchases components of the assessment.

Petitioner also rented containers for its own use from other companies. Such rental resulted in an assessment of $313.77.

Petitioner's charges for "container use" or "compactor use" varied depending upon the competition. Among the factors in determining the "container use" or "compactor use" charges was the number of times the customer required petitioner's dumping service. The greater the frequency of dumping service, the greater the likelihood that petitioner would offer a more favorable "use" charge.

As previously noted, nearly all of petitioner's customers sought from petitioner both a container/compactor and the removal by petitioner of trash accumulated therein. Petitioner sought to provide all of its customers this "complete package". Petitioner also, however, had a small number of customers to which it provided a container/compactor without providing the trash removal service. The East Rochester division identified 9 customers out of about 1,400 accounts to whom it provided containers or compactors without trash removal. Many of these customers used the containers for storage on a short-term basis. Additionally, in a handful of cases, petitioner provided its trash removal service to customers who supplied their own container or compactor.

At the termination of its service agreements petitioner re-took possession of its containers and compactors and re-used this equipment in connection with other customers.

Petitioner could, and in fact did, in some cases, provide waste removal services without the use of containers or compactors. The use of containers and compactors, however, enabled petitioner and its customers to have waste removed in a much more clean and efficient manner.

Port-o-lets

Petitioner's East Rochester division was also in the business of providing and periodically cleaning portable toilets, known as Port-o-lets, for customers. Petitioner's customers wanted portable toilets to provide sanitation facilities in places where none were then located. Petitioner delivered the Port-o-lets to the customer's site where they were used by customers to reduce off-site time spent by employees and others to use sanitation facilities.

Petitioner returned to the customer's site on a periodic basis (usually weekly but sometimes more frequently) to clean the unit or units located there. Petitioner pumped the waste out of the unit, replenished the unit with fresh water and chemicals, washed the entire unit out, and replaced the toilet paper.

The Port-o-let service was provided by petitioner pursuant to standard "Service Agreements", the terms of which provided, in relevant part, the following:

"2. Use by Customer.

(a) Customer has inspected the equipment and finds it to be in good condition and suitable for his needs.

(b) Customer will permit the equipment to be used only for the proper sanitation purposes for which it was intended.

(c) Customer will make no alterations or attachments to the equipment.

(d) Customer has chosen the location for installing the equipment and accepts all responsibility in connection with that choice of location.

(e) Customer will give Port-O-Let [petitioner] free access to the equipment at all times over suitable pavement or other driving surface, and will make the equipment available for servicing or maintenance at ground level without hazard to Port-O-Let's agents, employees or equipment.

(f) Customer will notify Port-O-Let immediately and discontinue use of the equipment if the equipment becomes unsafe or in disrepair for any reason.

(g) Customer will not permit the equipment to become subject to any lien, charge or encumbrance.

3. Maintenance. Port-O-Let will recharge and service the equipment in accordance with the terms set forth on the front of this Agreement. Port-O-Let's obligation to maintain the equipment in good working order under ordinary use is conditioned upon Customer's compliance with the use obligations set forth in paragraph 2.

4. Customer's indemnity. Customer will indemnify Port-O-Let, its employees and agents against any claim, liability or cost arising from this agreement or the use of the equipment, including property damage and personal injuries, except to the extent that such claims, liabilities or costs are due to Port-O-Let's sole negligence. Customer will promptly reimburse Port-O-Let for any damage to or loss of the equipment. Equipment damage beyond repair will be paid for by Customer at replacement cost."

The Port-o-let service agreements and invoices each listed a single charge, "service charge per month" and "flat rate service", respectively.

Petitioner also provided Port-o-lets to customers for special events pursuant to a "Special Event Agreement" contract having terms and conditions identical to those contained in the "Port-o-let Service Agreement".

There is no evidence in the record that petitioner provided portable toilets without the cleaning service or vice-versa.

Petitioner charged and collected sales tax upon all charges to its (non-exempt) customers in respect of its waste removal and portable toilet business.

OPINION

In the determination below, the Administrative Law Judge held that petitioner's purchases of containers, compactors, portable toilets and repair parts were not subject to tax pursuant to Tax Law § 1105(a). The Administrative Law Judge specifically held that the equipment at issue had been actually transferred to petitioner's customers within the meaning of the exclusion provided by Tax Law § 1101(b)(4)(i)(B). It was further determined that the rental of containers and compactors by petitioner was inseparably connected to petitioner's waste removal service and, therefore, could not be considered a separate transaction for sales tax purposes. The Administrative Law Judge found that petitioner provided a single integrated trash removal service.

On exception, the Division of Taxation (hereinafter the "Division") asserts that the phrase "actually transferred" requires transfer of legal title or a permanent physical transfer of the property to the purchaser. The Division maintains that the transfer of mere physical possession of the subject equipment to petitioner's customers does not constitute actual transfer within the meaning of Tax Law § 1101(b)(4)(i)(B). The Division further contends that the Administrative Law Judge erred in his reliance on the decision of the Tribunal in Matter of Chem-Nuclear Sys. (Tax Appeals Tribunal, January 12, 1989). The Division argues that the decision in Chem-Nuclear is distinguishable on the facts from the instant matter because in that case the property was not reusable and its transfer was permanent. The Division also asserts that petitioner is not in the rental business, but rather provides a single integrated trash removal service.

In response, petitioner argues that the phrase "actually transferred" must be given its ordinary meaning, which includes the transfer of either physical possession or legal title of the property. Petitioner asserts that it has satisfied that definition since it has shown that physical possession of the subject equipment is transferred to its customers. In the alternative, petitioner contends

that it has established that the subject equipment was purchased exclusively for rental to its customers.

We reverse in part and affirm in part the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1105(a) imposes a tax upon every retail sale of tangible personal property unless otherwise excluded, excepted or exempted (Tax Law § 1105[a]). A "retail sale" is defined in general terms as "the sale of tangible personal property to any person for any purpose" (Tax Law § 1101[b][4]). Excluded from the definition of a retail sale is the purchase of tangible personal property where that property is "later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax" (Tax Law § 1101[b][4][i][B]). The performance of waste removal services are held subject to tax under Tax Law § 1105(c)(5).

In reversing the determination of the Administrative Law Judge, we are guided by the decision of the Court of Appeals in U-Need-A-Roll Off Corp. v. New York State Tax Commn. (67 NY2d 690, 499 NYS2d 921) which involved substantially identical facts to those present in the instant matter.

The petitioner in U-Need-A-Roll Off Corp. was a trash removal company which supplied dumpsters and compactors to its customers for the collection of refuse. The containers were physically present on the customers' property until the petitioner was asked to unload or remove them. Except for the small percentage of customers who rented the equipment without purchasing the trash removal service, the various rates charged by the petitioner covered both the use of the equipment and the trash removal service. The fees charged by the petitioner varied depending upon several factors including: the size of the equipment, the number of times trash removal was desired and the amount of waste generated (see, Matter of U-Need-A-Roll Off Corp., State Tax Commn., February 24, 1984). Some customers were charged a flat fee per month for the service. During the period at issue, the petitioner in U-Need-A-Roll Off Corp. had not paid sales tax on the purchases of the containers, having claimed that the

containers had been purchased for resale, i.e., the rental to its customers and, therefore, were exempt from the imposition of sales tax. The Court, in construing Tax Law §§ 1101(b)(4) and 1105(a) rejected the petitioner's argument that the property had been purchased for resale pursuant to Tax Law § 1101(b)(4) and held the purchases subject to tax as retail sales. In reversing the Appellate Division and reinstating the decision of the former State Tax Commission, the Court held that substantial evidence in the record supported the determination that the petitioner's transactions with its customers did not involve the rental of personal property (see, U-Need-A-Roll Off Corp. v. New York State Tax Commn., supra).

The essence of petitioner's position in the instant matter is that the purchase of the equipment is not a retail sale because such purchases fall within the "actually transferred" exclusion under section 1101(b)(4)(i)(B) of the Tax Law. Petitioner, in arguing that the exclusion is applicable here, is necessarily arguing that the purchases do not constitute retail sales. That position, however, is in direct conflict with the decision of the Court of Appeals in U-Need-A-Roll Off Corp. wherein the court held that the purchases of equipment by a taxpayer similarly situated to petitioner met the definition of a retail sale.

We fail to perceive any significant difference between the instant matter and the factual situation presented in U-Need-A-Roll Off Corp. In both cases, the taxpayer performed a waste removal service which included supplying various types of waste receptacles to the customers and removal of the accumulated refuse at certain intervals. In both cases, nearly all of the customers paid for both the use of the equipment and the trash removal service, though some customers rented or leased the equipment without requesting trash removal service. The rented equipment at issue in both cases then remained on the customers' property for some period of time whereupon the taxpayer would reclaim the equipment. In the instant matter, as in the factual situation presented in U-Need-A-Roll Off Corp., the charges by the vendor cannot be separated out into a service component and a use component. In U-Need-A-Roll Off Corp., the containers and compactors were supplied to the customers as part of the service without any distinguishable consideration charged for the use of that equipment. Notably, the fees charged

by the vendor in that case depended on several factors, including the number of times that trash removal was desired by the customer (see, Matter of U-Need-A-Roll Off Corp., State Tax Commn., supra). Petitioner's charges in this case likewise reflect the artificiality of the separation of charges for a service component and a separate use component. Petitioner's billing practices with regard to container and compactor charges varied depending upon the competition and the number of times the customers required the dumping service; the greater the frequency of the dumping service, the greater the likelihood that the customer would receive a more favorable use charge. Petitoner's billing practices with respect to the Port-o-lets consisted of a flat rate service charge which included both provision of the equipment and the waste removal service. In analyzing the factual situation in U-Need-A-Roll Off Corp., the Court concluded that the purchases of that equipment constituted a retail sale. On the substantially identical facts present here, we find based on the decision in U-Need-A-Roll Off Corp. that petitioner's argument that its purchases are not retail sales must be rejected.

We next address the argument that the decision of the Tribunal in Matter of Chem-Nuclear Sys. (supra) is inconsistent with the foregoing conclusion. The decision in Chem-Nuclear is easily distinguished from the instant matter. In Chem-Nuclear, we held that liners used in the processing of radioactive waste were "actually transferred" to the petitioner's customers within the meaning of the exclusion provided by Tax Law § 1101(b)(4)(i)(B). Operative to our conclusion in that decision was the fact that once the liners were exposed to the radioactive waste and contaminated, the liners were no longer reusable by the petitioner. For all practical purposes, the liners were effectively consumed in the processing of the customers' waste. In that case, therefore, the effective consumption of the liners indicated that the transfer of the equipment was essentially permanent since the liners were buried in disposal sites and could not be reused (see, Matter of Chem-Nuclear Sys., supra). In Chem-Nuclear, we concluded that the transfer of the liners was within the ordinary meaning of the phrase "actually transferred" despite the fact that the petitioner repossessed the liners from the customers after their use in the waste processing system. We found the fact of repossession immaterial since

the liners were effectively consumed and could not be reused by the taxpayer upon repossession. The transfer in Chem-Nuclear was the functional equivalent of a permanent transfer. In contrast, the equipment in the instant matter is only temporarily located on the customers' property and then is reclaimed and reused by petitioner in connection with trash removal services provided to other customers. This crucial fact, that the equipment is capable of reuse by the vendor and is not effectively consumed in the performance of the service, requires a conclusion that the equipment was not actually transferred to the customers within the meaning of Tax Law § 1101(b)(4)(i)(B).

In the alternative, petitioner contends that it was engaged in the rental of equipment separate and apart from its waste removal service. We do not agree. As noted above, the record clearly demonstrates that the provision of the subject equipment to petitioner's customers was inseparably connected to the waste removal service and cannot be considered a separate transaction for sales tax purposes (see, Matter of Atlas Linen Supply Co. v. Chu, 149 AD2d 824, 540 NYS2d 347, lv denied 74 NY2d 616, 550 NYS2d 276; Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). It is clear that the equipment provided by petitioner is an integral and inseparable component of petitioner's waste removal service and further, that the charges relating to the provision of that equipment cannot be reasonably construed as arising from a separate transaction (see, Matter of Atlas Linen Supply Corp. v. Chu, supra, 540 NYS2d 347, 349; Matter of Penfold v. State Tax Commn., supra, 494 NYS2d 552, 553).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed in part and affirmed in part;

3. The petition of Waste Management of New York, Inc. is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 16, 1987 is sustained.

DATED: Troy, New York
March 21, 1991

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

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

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