STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BRISTOL-MYERS COMPANY INDUSTRIAL DIVISION	:	DECISION DTA No. 808692
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, 1986 through August 31, 1988.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 10, 1993 with respect to the petition of Bristol-Myers Company Industrial Division, P. O. Box 4755, Syracuse, New York 13221. Petitioner appeared by Bond, Schoeneck & King (Gary R. Germain, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition to the exception. The Division of Taxation filed a letter in lieu of a reply brief. Oral argument was heard on May 19, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax on waste removal and processing charges paid by petitioner.

II. Whether, if so, such imposition violates 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 June 15, 1989, the Division of Taxation ("Division") issued to petitioner, Bristol-Myers Company Industrial Division, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1986 through August 31, 1988 in the amount of $36,853.88, plus interest.

Petitioner challenged the above notice of determination by requesting a conciliation conference. On January 25, 1990, a conciliation conference was held. Thereafter, on July 13, 1990, Conciliation Order No. 098182 was issued pursuant to which the amount of tax assessed was reduced to $14,393.51. This reduced amount represents tax calculated as due on fees paid by petitioner for pick-up, transportation, processing and disposal of certain hazardous wastes created at petitioner's East Syracuse, New York facilities. On June 14, 1990, prior to issuance of the Conciliation Order, petitioner consented to and paid tax in the amount of $4,552.35, representing tax due on the transportation portion of the services described above. This payment was noted (by footnote) on the Conciliation Order, thereby leaving at issue in this proceeding $9,841.16, representing tax calculated on fees paid for processing and disposal of the wastes.

As noted above, petitioner generates significant amounts of small quantity hazardous wastes on a continuous basis, which must be removed from its plant in East Syracuse, New York and thereafter treated for proper disposal. In order to meet this need for removal, treatment and disposal, petitioner contracted with Rollins Environmental Services, Inc. ("Rollins"), an entity which operates facilities for the treatment or destruction of hazardous waste. Rollins' facility, as relevant to this proceeding, is located in Bridgeport, New Jersey.

Included as part of petitioner's submitted documents were materials relating to a proposal by Rollins to handle the wastes generated by petitioner. By a letter dated July 1, 1991, Rollins

advised petitioner that "hazardous and non-hazardous waste produced at [petitioner's] East Syracuse, New York facility may be transported in Rollins owned and operated equipment OR in non-Rollins owned and operated equipment." Part of Rollins' written proposal to provide for petitioner the services described above included the following:

> "[Petitioner] desires turnkey Lab Pack services. These services to include labor, materials, labeling, manifesting, transportation, and disposal of packaged waste material."

The Rollins proposal goes on to more specifically describe each of the services to be provided, including management, manifesting, transportation, disposal and tracking (with certifications of destruction).

During the period in issue, petitioner opted to have Rollins provide the pick-up and transportation services as well as the treatment and disposal services for the wastes involved. Rollins' invoices to petitioner separately stated the charges for treatment and/or destruction of the wastes as well as the charges for pick-up and transportation of such wastes. As described above, the dollar amount of the assessment remaining in question is calculated based upon the fees paid by petitioner for treatment and disposal or destruction of the wastes at the Rollins facility located in Bridgeport, New Jersey (noting that petitioner has previously paid the tax calculated on fees paid for removal and transportation of the hazardous waste from petitioner's East Syracuse facility to the Rollins New Jersey facility).

OPINION

The Administrative Law Judge, based on our decision in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992), determined that the sales tax as applied to petitioner, i.e., taxation of the entire receipt for the integrated service of removal of waste, transportation of the waste from petitioner's plant in New York to the disposal site in New Jersey and processing of the waste in New Jersey, violates the Commerce Clause (apportionment) standards.[1] Noting

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[1] In General Electric, we rejected General Electric's contention that (1) the disposal of waste material in Arkansas through the process of incineration was a separate service from the "removal" of the waste from General Electric's facility in New York and (2) the tax imposed on the processing in Arkansas was unconstitutional because the activity

that petitioner had conceded and paid the tax due on the transportation charges, the Administrative Law Judge made no determination on that amount (Determination, conclusion of law "F," footnote "2"). On exception, the Division asserts that our decision in General Electric was wrong. The Division reiterates the position stated in TSB-M-92(3)S[2] and the arguments made at hearing.

On exception, petitioner agrees with the determination of the Administrative Law Judge and the result reached by this Tribunal in General Electric, i.e., that taxation of the entire receipt violates the Commerce Clause (apportionment) standards.

Petitioner also asserts that the Division's interpretation of section 1105(c)(5) to include out-of-state processing as part of an integrated service of waste removal is arbitrary, lacks a sound basis in law and leads to irrational results which are contrary to public policy. In particular, petitioner asserts that the Division's position that New York State would not tax the processing, in New York, of out-of-state waste (under Tax Law § 1105[c][2]), if the waste was brought into New York as part of an integrated waste removal service is not sound public policy. Petitioner asserts that the Division's position:

> "creates a perverse and irrational incentive: New York could become the destination of choice for hazardous waste from other states.

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did not have sufficient nexus with New York. We concluded that the removal, transportation and the ultimate disposal of waste was an integrated service (Matter of Cecos Intl. v. State Tax Commn. (126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811); since the service occurred partly within New York, it was taxable as a service of maintaining, servicing or repairing real property (Tax Law § 1105[c][5]; 20 NYCRR 527.7[b][2]); since the incineration of the waste was done wholly in Arkansas, the Division's imposition of the tax upon the entire receipt was not fairly apportioned under Commerce Clause standards (Goldberg v. Sweet, 488 US 252) since, if Arkansas has the same law as New York, it would view waste removal as an integrated service and since one aspect of the service, i.e., processing, occurred wholly in Arkansas, then Arkansas could tax the entire receipt for the integrated service. We also concluded that there was a practical way to apportion the New York State tax as a part of the entire service so as to clearly tax only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

[2]After our decision in General Electric, the Division issued an Opinion of Counsel (TSB-M-92[3]S) in which it asserted that since the real property from which the waste was removed was situated in New York, the entire receipt, including the out-of-state processing of the waste, was subject to tax. The lynchpin of the Division's position was that section 1105(c)(5), which taxes the integrated service of trash removal, and section 1105(c)(2), which taxes the processing of waste, were mutually exclusive. Thus, "another state imposing an identical tax would not . . . deem the portion of an integrated service occurring within its borders to be a processing service taxable under section 1105(c)(2)" (TSB-M-92[3]S).

> "Processing hazardous waste clearly makes greater and longer-lasting demands on the delivery of government services than merely transporting it over public highways. Sound public policy demands that taxing authorities recognize this imbalance, and administer the tax law in a manner that rationally relates revenues to the services provided. Instead, in its zeal [to tax the processing here], the Division propounds a theory that ensures irrational results contrary to the public interest" (Petitioner's brief, pp. 10-11).

Petitioner concludes its argument as follows:

> "The Division's integrated service theory operates unreasonably and arbitrarily, imposing a tax out of all appropriate proportion to the services provided by New York State [cite omitted]. New York State should not be permitted, under the shelter of its integrated service theory, to project its taxing power plainly beyond state borders [cite omitted]. The Division uses its theory to ignore the fact that the processing transaction was performed wholly outside the state, thereby receiving no benefit of services provided by New York State.
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> "Because the Division has applied the Tax Law to impose an unapportioned tax on interstate commerce, the assessment clearly violates the Commerce Clause of the U.S. Constitution" (Petitioner's brief, p. 23).

While the exception in this case was pending, the Tribunal issued its decision in Matter of Waste Conversion (Tax Appeals Tribunal, August 25, 1994), in which we addressed the same issues as in General Electric in the context of the Division's more expansive post-General Electric articulation of its position as reflected in TSB-M-92(3)S. In Waste Conversion, we affirmed our decision in General Electric. We reach the same result here for the identical reasons.

Since the Administrative Law Judge's determination is based on General Electric and the Division's arguments here are that General Electric is wrong, it is appropriate that we reiterate our resolution of these issues in the context of this case.

We deal first with the Division's assertion that the case law in New York stands for the proposition that removal, transportation and ultimate disposal of industrial or hazardous waste from a customer's New York property is taxable as an integrated trash removal service and is subject to the provisions of Tax Law § 1105(c)(5).

We agree with the Division that the service is an integrated service and that since part of the service occurred within New York, it is taxable under section 1105(c)(5) (see, Matter of General Electric Co., supra).

We deal next with the Division's assertion that, in effect, our decision in General Electric was that section 1105(c)(5) was unconstitutional per se and not merely the Division's misapplication of the law to the facts in that case.

We cannot agree.

First, the petitioner in General Electric did not challenge the validity of section 1105(c)(5) per se. The petitioner challenged the validity of the assessment issued to it by the Division on the ground that application of section 1105(c)(5) by the Division to the entire receipt for the service purchased, including the processing of the waste in Arkansas, violated the apportionment standard of the Commerce Clause.

Second, it is clear that General Electric was required to raise this issue of the proper application of the statute first through the administrative hearing process (Young Men's Christian Assoc. v. Rochester Pure Waters Dist., 37 NY2d 371, 372 NYS2d 633).

Third, it is clear that this Tribunal has the jurisdiction to determine the validity of assessments issued by the Division (Tax Law §§ 2000 and 2006[4][7]) and whether the Division has applied the statute in a constitutional manner (Young Men's Christian Assoc. v. Rochester Pure Waters Dist., supra).

Fourth, the governing principle as to whether our decision was that the statute was unconstitutional as applied was the necessity of the factual record upon which our decision was based.[3] On this point, it is

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[3]See also, CPLR § 7801 Practice Commentaries C7801:6 "When a claim is made that a statute is unconstitutional on its face, the proper procedure is to maintain an action for a declaratory judgment; when the claim is that a statute has been unconstitutionally applied by a state officer, the proper way to proceed is to bring an Article 78 proceeding [cites omitted].

"The reason for the distinction is obvious. When the attack is upon the essential validity of the statute, a question of law is presented and no particular record need be developed. Accordingly, an action for declaratory judgment lies. On the other hand, when the basis of the attack is that the statute has been unconstitutionally applied to the petitioner, an appropriate factual record must be developed which can then be reviewed in an Article 78

clear that our decision in General Electric was not, as asserted in the Opinion of Counsel, decided on a question of law, i.e., "the absence of a statutory provision which apportions to another jurisdiction part of the receipt subject to tax under section 1105(c)(5) or provides a credit against New York sales tax for taxes paid to another jurisdiction" (TSB-M-92[3]S). On the contrary, in that portion of our opinion referred to by the Division, we merely applied the "practical inquiry" framed by the Supreme Court and determined, based on the facts of the case, that the Division could apply the statute in a way that would apportion the tax.

We deal next with the Division's assertion that:

> "[n]otwithstanding that the Tribunal does not have jurisdiction to rule on the constitutionality of the tax statute in question, a proper legal analysis of the controlling case law would lead to a determination that the subject taxing provision does not violate the Commerce Clause of the United States Constitution.
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> "The ALJ has erroneously found that the Tribunal's reasoning in General Electric is applicable here, concerning whether the tax in controversy is fairly apportioned, and has thereby implied that the tax being imposed fails the internal and external consistency test articulated in Goldberg v. Sweet" (Division's brief, pp. 16-17).

The Division's rationale for this position is as follows. First, there is no evidence that petitioner has suffered any actual double taxation as a result of the tax being imposed by New York since:

> "petitioner has not offered any evidence whatsoever herein that it has actually made any tax payments to New Jersey, or any evidence showing the amounts of any such payments during the audit period. Nor is there any evidence of record to show that any payments so made by petitioner relate to the services that have been taxed by New York.
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> "Without such evidence, there can be no showing of actual double taxation in this case" (Division's brief, pp. 17-18).

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proceeding in the nature of either certiorari or mandamus."

We cannot agree. The test is whether there is a "risk" of double taxation not "actual" double taxation as the Division asserts (Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 US 425). As we stated in General Electric in responding to the same implication by the Division, "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" (Matter of General Electric Co., supra; see also, Hellerstein State Taxes ¶ 4.06[1][a] for a definitive discussion of this issue).

We deal next with the Division's assertion that there is no possibility of multiple taxation in the present case under the internal consistency test in Goldberg because:

> "under the transactional approach of New York's sales tax, the only rational situs of a taxable event under § 1105(c)(5) is the location of the real property . . . . On the other hand, a transaction involving an integrated service of waste removal from real property located outside of New York would, under the provisions of New York's statute, have a taxable situs outside the State. Such a transaction would therefore not be subject to tax under § 1105(c)(5), even if the processing and disposal components of the integrated service took place within New York.
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> * * *
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> "Thus, there is no risk of duplicate taxation by another state, if that state's law is identical to New York's Tax Law" (Division's brief, pp. 19-21).

We cannot agree. The result of the Division's position is that under a similar statutory scheme New Jersey would be precluded from taxing the processing of the waste in New Jersey if the waste came from outside the state in an integrated waste removal service. We find this position inconsistent with the interstate nature of the service and oblivious to the efforts by state and local governments, through taxation and other means, to develop efficient waste control systems.[4] Moreover, we find no discernible legal basis for the Division's position.

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[4]See Justice Kennedy's opinion in C & A Carbone v. Town of Clarkstown, New York (114 S.Ct. 1677, 128 L.Ed.2d 399):

> "[a]s solid waste output continues space and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment. See Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); Chemical Waste Management, Inc. v. Hunt, 504 U.S. ___, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); Fort Gratiot

The heart of the Division's position is that sections 1105(c)(2) and 1105(c)(5) are mutually exclusive and that the case law in this State prevents the Division from imposing tax on the receipts for the service of processing of waste in New York where such waste is initially generated from outside New York and the processing is part of an integrated service.

The underlying issue in Matter of Penfold v. State Tax Commn. (114 AD2d 696, 494 NYS2d 552) and in Matter of Cecos Intl. v. State Tax Commn. (supra), cited by the Division, was the definition of receipt in Tax Law § 1101(b)(3), i.e., "the amount of the sale price of any service . . . without any deduction of expenses" (emphasis added), and efforts by vendors to reduce the price of the service provided by deducting specific expenses. Neither of these cases, or any other case law relied upon by the Division, dealt with the authority of New York State to tax, pursuant to section 1105(c)(2), the processing of waste in New York where the waste was generated outside of New York State.

What is clear to us is that both section 1105(c)(5), which views trash removal as integrated service consisting of removal, transportation and disposal, and section 1105(c)(2), which allows the taxing of the processing of tangible personal property which takes place in the state, comprise the statutory scheme to be considered in the application of the internal consistency test. If New Jersey had the same law, then it could tax the processing that takes place in its state on either basis, i.e., under section 1105(c)(5) or 1105(c)(2). The result would be double taxation between New York and New Jersey.

Along these lines, we would point out that the Division's assertion that sections 1105(c)(5) and 1105(c)(2) are mutually exclusive appears inconsistent with a recent Advisory Opinion (TSB-A-93[54]S, October 5, 1993). The question was whether the services of cleaning up toxic waste spills and sites are subject to sales tax. The service was described as the clean up

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Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. ___, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. ___, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). The case decided today, while perhaps a small new chapter in that course of decisions, rests nevertheless upon well-settled principles of our Commerce Clause jurisprudence."

and the delivery of the waste to a location specified by the customer or to a disposal site designated by the customer. The opinion stated that "[t]he service of cleaning up toxic waste and processing is subject to the sales tax imposed under sections 1105(c)(2) and (c)(5) of the Tax Law (see, Cecos Intl. v. State Tax Commn., 126 AD2d 884, affd 71 NY2d 934)" (TSB-A-93[54]S).

We deal next with the Division's assertion that the external consistency test requires an analysis of the actual statutes of other states. The Division asserts that there is no such discussion of Arkansas law in General Electric, nor any discussion of how the absence of a credit provision in New York's Tax Law resulted in actual double taxation to General Electric. "In view of these circumstances, it appears that the General Electric decision erroneously considered the absence of a credit provision in New York's tax to be fatal, thereby leading to the conclusion that Tax Law § 1105(c)(5) is not externally consistent" (Division's brief, p. 24).

The Division goes on to assert that our conclusion in General Electric concerning external consistency:

> "appears to be grounded on the absence of a statutory provision which either (a) apportions to another jurisdiction part of the receipt subject to tax under § 1105(c)(5), or (b) provides a credit against the New York tax for taxes paid to another jurisdiction" (Division's brief, p. 24).

The Division's final point is that apportionment would require New York to assume the type of administrative burden that Goldberg found inappropriate. It will be helpful if we first briefly review the external consistency analysis in Goldberg. The Court first considered the taxpayer's assertion that "any tax assessed on the gross charge of an interstate activity cannot reasonable reflect in-state business activity and therefore must be unapportioned" (Goldberg v. Sweet, supra, at 262, emphasis added). The Court rejected this argument noting that:

> "[t]he tax at issue has many of the characteristics of a sales tax. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States . . . the Tax Act reasonably reflects

> the way that consumers purchase interstate telephone calls" (Goldberg v. Sweet, supra, at 262, emphasis added).

In Goldberg, the Court also agreed with the State that since the Tax Act reaches only those interstate calls which are "(1) originated or terminated in Illinois and (2) charged to an Illinois service address" the risk of multiple taxation is "exaggerated." The Court noted that it was doubtful if other states would have nexus to tax the call.[5]

The Court went on to state in effect that it was not feasible to devise an apportionment formula that would be practical given the electronic technology of interstate phone services.

With the analysis as a guide, we conclude as we did in General Electric that taxing the entire receipt, when the entire processing and part of the transportation takes place in New Jersey, results in New York taxing more than that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

As we earlier stated, our decision in General Electric was not, as the Division asserts, decided on a question of law, i.e., the absence of a statutory provision which apportions to

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[5]Specifically, the Court in Goldberg stated:

> "[w]e doubt that States through which the telephone call's electronic signals merely pass have a sufficient nexus to tax that call . . . . We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call [cite omitted].
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> "We believe that only two States have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call. The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the origination or termination of an interstate telephone call billed or paid within that State [cite omitted].
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> "We recognize that, if the service address [State #1] and billing location of a taxpayer [State #2] are in different States, some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme [cite omitted]. To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation [cite omitted]. ('The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States') [cite omitted]" (Goldberg v. Sweet, supra, at 263-264).

another jurisdiction a part of the receipt subject to tax under section 1105(c)(5) or provides a credit against New York sales tax for taxes paid to another jurisdiction.

Here, as in General Electric, we make the "practical inquiry" and find a service which has distinct elements; i.e., removal of the waste from the real property which is performed entirely in New York State; transportation of the waste from the real property to New Jersey where it is to be processed which is performed both in and out of New York; and processing of the waste, which is performed wholly outside New York.

While there is no question that the purchase of an integrated service is commonplace, unlike the holding in Goldberg, there is clear nexus for New Jersey to tax the processing which takes place in that State. We find, as we did in General Electric and Waste Conversion, that there is a practical method to apportion the cost, one which does not, as the Division asserts, create the administrative inconvenience sought to be avoided in Goldberg. Finally, we point out that, here as in General Electric and Waste Conversion, the invoices to petitioner from Rollins, its service provider, separately stated the charges for treatment and/or destruction of the wastes, as well as the charges for pick-up and transportation of the wastes.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petition of Bristol-Myers Company Industrial Division is granted; and

4. The Notice of Determination dated June 15, 1989 is cancelled with respect to that portion relating to fees paid for the processing and disposal of waste.[6]

DATED: Troy, New York
September 15, 1994

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

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

[6]As noted in our findings of fact, petitioner has conceded and paid tax with respect to transportation charges.