STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROLLINS ENVIRONMENTAL SERVICES (NJ), INC.	:	
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 June 1, 1985 through May 31, 1988.	:	
	:	DECISION DTA Nos. 808882 & 808883
In the Matter of the Petition	:	
of	:	
ROLLINS ENVIRONMENTAL SERVICES (TX), INC.	:	
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 June 1, 1985 through November 30, 1988.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 13, 1993 with respect to the petition of Rollins Environmental Services (NJ), Inc., Attention: Donald Cerniglia, P.O. Box 337, Bridgeport, New Jersey 08014, and Rollins Environmental Services (TX), Inc., 2027 Battleground Road, Houston, Texas 77536. Petitioners appeared by Cooper, Erving, Savage, Nolan & Heller (Madeline H. Kibrick Kauffman and Richard H. Weiner, Esqs., 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 in support of its exception. Petitioners filed a brief in opposition to the exception. The Division of Taxation filed a reply brief. Oral argument was heard on April 20, 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 petitioners' waste removal and processing services.

II. Whether, if so, such imposition violates the Commerce Clause of the United States Constitution.

III. Whether petitioners have established any bases sufficient to warrant reduction or abatement of penalties.

FINDINGS OF FACT

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

On March 6, 1989, the Division of Taxation ("Division") issued to petitioner Rollins Environmental Services (NJ), Inc. ("Rollins [NJ]") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period June 1, 1985 through May 31, 1988 in the amount of $729,933.00, plus penalty and interest. On the same date, the Division also issued a second such notice assessing additional omnibus penalty (only) for the same period in the amount of $72,993.29.

On July 19, 1989, the Division issued to petitioner Rollins Environmental Services (TX), Inc. ("Rollins [TX]") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period June 1, 1985 through November 30, 1988 in the amount of $136,754.52, plus penalty and interest. On July 14, 1989, the Division also issued a second such notice assessing additional omnibus penalty (only) for the same period in the amount of $23,576.46.

Each of the above-described notices was issued upon the basis of an audit of the businesses conducted by Rollins (NJ) and Rollins (TX). Such entities offer nearly identical waste removal, treatment and disposal services, as more fully described hereinafter.

Rollins (NJ) is a foreign corporation with its principal and sole place of business in Bridgeport, New Jersey. The Rollins (NJ) facility is a fully-permitted, hazardous waste treatment, storage and disposal facility. The Rollins (NJ) plant operates under hazardous waste management, air quality and surface water discharge permits issued by the State of New Jersey, as well as permits issued by the United States Department of Environmental Protection (the "EPA") under the Resource Conservation and Recovery Act ("RCRA"). During the audit period, Rollins (NJ) employed between 90 and 100 people to operate the facility and conduct its business.

Rollins (TX) is a foreign corporation with its principal and sole place of business in Deer Park (a Houston suburb), Texas. Like Rollins (NJ), Rollins (TX) is a fully-permitted, hazardous waste treatment, storage and disposal facility. The Rollins (TX) plant operates under permits issued by the State of Texas, and by the EPA under RCRA and the Toxic Substance Control Act ("TSCA"). The actual operations of the Rollins (TX) and Rollins (NJ) facilities are substantially similar. However, the Rollins (TX) plant is approximately three times larger than the Rollins (NJ) plant, and is one of only three high-temperature incinerators in the United States permitted to combust PCBs.[1] During the audit period, Rollins (TX) employed over 200 people to operate its facility and conduct its business.

During the audit period, wastes generated by various companies were transported to the Rollins (NJ) plant via customer delivery, common carrier or via one of four Rollins (NJ) trucks. In the case of Rollins (TX), such wastes were transported to the Rollins (TX) plant via customer delivery or common carrier. Rollins (TX) did not have any trucks during the audit period.

All wastes received at the Rollins (NJ) and Rollins (TX) facilities are sampled, and a "fingerprint" analysis is conducted to confirm the identification of each particular waste stream.

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[1]Rollins (NJ) is not authorized to combust PCBs.

The majority of the waste streams are tested for BTU heat content, tar content, and 14 to 15 different heavy metals. In addition, the waste streams are analyzed to ascertain the amount of acidity generated on combustion, and the residue which will remain following incineration. These analyses establish the compatibility of the wastes with other waste streams and with the Rollins' facilities' storage drums, tank farms, pipelines and pumps. The analyses also provide information regarding how to handle the specific wastes, and how and in what proportions to blend the wastes for efficient incineration.

Solid wastes are stored in barrels or drums (or in some instances bags), while liquid wastes are stored and blended in large (7,000 to 20,000 gallons) tanks maintained at the Rollins (NJ) and Rollins (TX) plants. After preparation for incineration, the solid wastes are placed on a motorized roller conveyor, which carries the wastes onto an elevator system for transport into a rotary kiln for incineration. After the liquid wastes are blended in preparation for incineration, they are pumped into an injector and atomized with air. In either case, following incineration, the combustion gases remaining from the liquid and solid wastes exit into an afterburner and are destroyed at temperatures of approximately 2500 degrees Fahrenheit, thereby effecting a complete burn.

In response to the notices of determination, requests for conciliation conferences were timely filed by Rollins (NJ) and Rollins (TX), and a consolidated conciliation conference was commenced on November 6, 1989.

On May 16, 1990, the conciliation conferee issued identical letters describing his understanding of the issues involved in these matters and proposing certain adjustments reducing the notices of determination. In each letter, the conferee stated:

> "In the instant matter[s], the waste is transported via one of three methods, common carrier, the customer itself, or by [petitioner's] own vehicle[s]. The audit division conceded that the treatment and disposal charges are exempt when delivered to the waste facility by common carrier and the customer itself. It is the charges for the transportation, treatment and disposal that are being held subject to tax when the waste is picked up by requester's (Rollins) own vehicles."

The conciliation conferee further indicated that petitioners would not be responsible for sales tax where Direct Payment Permits ("DP Permits") had been supplied to petitioners by the customers.[2]

On July 18, 1990, following issuance of the above-described letters, the conference was reconvened for the purpose of discussing which particular invoices would be considered subject to sales tax.

On August 17, 1990, Conciliation Order No. 97645 was issued to Rollins (NJ) reducing the tax to $198,960.00, plus penalty and interest, and reducing the additional omnibus penalty to $19,896.00. On the same date, Conciliation Order No. 99672 was issued to Rollins (TX) reducing the tax to $24,305.75, plus penalty and interest, and reducing the additional omnibus penalty to $2,430.57.

By a subsequent memorandum from the Division's auditor to the conferee, dated December 11, 1990, the tax claimed due from Rollins (NJ) was further reduced to $171,672.90, and the tax claimed due from Rollins (TX) was further reduced to $16,288.84. These reductions reflect adjustments made by the auditor to eliminate tax on those invoices which showed charges for treatment or disposal only (i.e., invoices reflecting customer delivery of wastes to petitioners, invoices reflecting out-of-state waste pick ups, and delivery of wastes to petitioners by common carrier with no transportation charge by petitioners indicated on the invoices).

The conferee provided a copy of the above-referenced memorandum to petitioners' representative, together with a letter, dated February 22, 1991, providing, in relevant part, as follows:

> "Pursuant to our telephone conversation this morning, I am enclosing copies of [the auditor's] memorandum and workpapers indicating additional adjustments subsequent to the July 18, 1990 conference.
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> * * *

[2]The conferee's letters issued to Rollins (NJ) and Rollins (TX) are substantively identical except for the dollar amounts of reductions in tax and penalties proposed in such letters for each of the individual petitioners.

> "As stated previously, the enclosed adjustments and any future adjustments made prior to a hearing should be brought to the attention of the Administrative Law Judge" (emphasis added).[3]

The Division's audit involved a detailed examination of petitioners' invoices for the audit period. Such invoices describe, inter alia, petitioners' customers (by name and address), reflect a numeric code for the waste type being handled, and list on separate lines petitioners' charges for the services involved, including charges for weighing, treatment (based on the type of waste involved), and disposal. In some instances, transportation charges are reflected on the invoices, including additional charges where special types of transport and/or handling equipment was required (again based on the type of waste involved). The invoices include a space where the waste transporter is identified (usually by its initials). In those instances where transportation and/or special equipment charges appear on petitioners' invoices, such charge(s) included a profit (markup) in excess of the amount(s) charged by the common carrier(s) involved.

Neither Rollins (NJ) nor Rollins (TX) owns or leases any real property in New York State, or maintains sales offices, sales personnel or telephone numbers in New York State. Petitioners' services are advertised via trade shows, buyers' guides and some mass mailings. Petitioners' sales representatives sometimes make "wild card" or "cold" calls to manufacturers in New York State. All contracts are signed on petitioners' behalf at the New Jersey or Texas plant locations.

We make the following additional findings of fact:

> By letter dated July 15, 1993, the Tribunal acknowledged receipt of the Division's exception and set a briefing schedule which required that the Division's brief in support of its exception be served by August 11, 1993. By letter dated August 11, 1993, the Division requested a 30-day extension for filing its brief. By letter dated August 23, 1993, the briefing date was extended to September 10, 1993. That letter indicated that: "[n]o further extensions will be granted." The due date for petitioners' brief in opposition was changed to October 11, 1993. The Division's reply brief had to be filed by October 26, 1993.

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[3]There is no evidence that any specific adjustments in addition to those set forth on the auditor's December 11, 1990 memorandum were made.

The Tribunal, by letter dated September 22, 1993, responded to a phone call from petitioners' representative concerning the Division's brief and indicated "that the Division . . . has not filed a brief in [this] matter. You are hereby granted until October 27, 1993 to file a brief in opposition."

In a letter dated October 5, 1993, the Division's representative indicated that he had returned from a four-day absence from the office and had read the Tribunal's September 22, 1993 letter to petitioners' representative. The Division's representative stated that "[s]ince [the Division's] brief was submitted on September 21, 1993, it appears that your letter and the brief crossed in the mail. However, for your convenience, I am enclosing another copy of the same."

The Tribunal, by letter dated October 12, 1993, informed the Division's representative that the Tribunal "did not receive a timely brief in support of [the] exception" and returned the brief forwarded with the October 5, 1993 letter. Also on October 12, 1993, the Tribunal received an envelope by courier which contained a letter, dated September 21, 1993, from the Division's representative and a brief in support of the exception.

Petitioners filed their brief in opposition on October 27, 1993 noting in their cover letter that the Division failed to file a brief in support of its exception by the due date of September 10, 1993. Petitioners also indicated they had received a copy of the Tribunal's October 12, 1993 letter to the Division, and requested "an opportunity to submit a surreply to respond to any arguments made by the [Division]."

By letter of November 1, 1993, the Tribunal responded to petitioners indicating "that surreply briefs are not generally accepted by the Tribunal. Furthermore, any reply brief filed by the Division . . . should be only a response to your brief in opposition and is not intended as a substitute for a brief in support."

On November 12, 1993, the Division served a "reply" brief which, with minor editing changes, was essentially the same as the brief which the Tribunal refused to accept from the Division in support of its exception.

All of the above correspondence was carried on with both parties.

OPINION

Initially, we wish to make it clear that, under the facts in this case, we limit our consideration to the arguments made by the Division in its exception and TSB-M-92(3)S, of

which we take official notice. In short, we can ascribe no rationale to the failure of the Division's representative to adhere to the extended schedule for filing of briefs (which the Division requested) other than a total disregard for the efforts of this Tribunal to administer an appeals system which provides both parties the timely opportunity to present their arguments to us so that we can resolve the controversy in this case. Thus, we will not consider the arguments in the Division's brief in support of its exception received by this Tribunal on October 12, 1993, one month after September 10, 1993, the extended due date for the brief. Nor will we consider the arguments in the Division's "reply" brief since to do so would render meaningless our rejection of the late-filed brief in support.

The Administrative Law Judge, as a preliminary matter, rejected the Division's assertion that the amounts at issue were those specified in the conciliation orders issued on August 17, 1990 to Rollins (NJ) and Rollins (TX). The Administrative Law Judge determined that the amounts at issue before him were $171,672.90 for Rollins (NJ) and $16,288.84 for Rollins (TX), the amounts reflected in the December 11, 1990 memorandum from the auditor to the conferee. Both amounts represented reductions made by the auditor from the amounts in the conciliation orders. The reductions eliminated tax on "those invoices which showed charges for treatment or disposal only (i.e., invoices reflecting customer delivery of waste to petitioners, invoices reflecting out-of-state waste pick ups, and delivery of wastes to petitioner by common carrier with no transportation charges by petitioners indicated on the invoices)" (Determination, finding of fact "13," emphasis added).

The Administrative Law Judge found the reductions "entirely consistent with the Division's specified basis for taxation in this case" and, based upon a review of a letter from the conferee to petitioners' representative dated February 22, 1991, concluded "that such reductions were allowed by the Division, were accepted by the conferee, and were specifically anticipated to occur post-conference as part of ongoing evidence review" (Determination, conclusion of law "D").

The Administrative Law Judge, based upon our decision in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992), determined that the sales tax as applied to petitioners, i.e., taxation of the entire receipt for the integrated service of removal of waste, transportation of the waste from petitioners' customers in New York to the disposal sites in New Jersey and Texas and processing of the waste in New Jersey and Texas, violates the Commerce Clause (apportionment) standards.[4] The Administrative Law Judge cancelled the entire assessments against Rollins (NJ) and Rollins (TX). In light of this action, the Administrative Law Judge determined that the issue of penalties was moot. The Division's exception in this case asserts, in essence, that our decision in General Electric was wrong. The Division reiterates the position stated in TSB-M-92(3)S[5] and the arguments made at hearing.

In response to the Division's exception, petitioners argue that our conclusion in General Electric was correct. Petitioners, however, reassert their position at hearing that the processing in

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[4]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 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.

[5]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).

New Jersey and Texas is separate and apart from the removal and transportation and beyond the scope of the New York tax. Petitioners argue that given the facts in this case, unlike those addressed by this Tribunal in General Electric, the imposition of New York sales tax violates the "substantial nexus" prong of the Commerce Clause.

> "In Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992), the United States Supreme Court held the imposition of a North Dakota use tax on Quill Corp., a mail-order office equipment and supplies business with offices in several states other than North Dakota which owns no (or nearly no) tangible property in North Dakota, and whose employees neither work nor reside in North Dakota, to be violative of the Commerce Clause.[6] Quill Corp. solicits its North Dakota customers through catalogs and flyers, advertisements in national periodicals and telephone calls, and delivers all of its merchandise to its North Dakota customers (from whom it derives significant annual revenue) by mail or common carrier. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1906.
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> "The Court concluded that while physical presence in a State is not required for purposes of meeting Due Process 'minimum contacts' requirements, a corporation lacking a physical presence in the taxing State and whose only contacts with the taxing State are by mail or common carrier lacks the 'sufficient nexus' required by the Commerce Clause. Id. at 1912, 1914. The Court further stated that the mere fact that Quill Corp. also licensed its software to some of its North Dakota clients might evidence 'a slightest presence' in the State; however, such a minimum presence is insufficient to meet the 'substantial nexus' requirement of the Commerce Clause. Id. at 1914, fn. 8.
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> "At bar, neither Rollins (NJ) nor Rollins (TX) own any real property in the State of New York. (R. 63, 92). Neither Rollins (NJ) nor Rollins (TX) has a sales office or a phone number in New York. (R. 63, 93). Rollins (NJ) and Rollins (TX) each have their own sales representatives. (R. 74). During the audit period, the Rollins (NJ) and Rollins (TX) sales representatives were stationed at their respective facilities, certain of these sales representatives working out of the national account group head-quartered in Wilmington, Delaware. (R. 73-74, 94). Customers seeking to engage the services of Rollins (NJ) and Rollins (TX) would ascertain the locations and telephone numbers of the two companies through advertisements, trade shows, buying guides and on occasion, mass mailings. (R. 93, 96). In addition, the sales

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[6]"Under the North Dakota use law every 'retailer' (defined as one maintaining a place of business in the State or who engaged in three or more advertisements within a twelve-month period) is required to collect from the consumer and remit to the State a use tax imposed upon property purchased for storage, use or consumption within North Dakota. Id. at 1908."

> representatives make 'wildcard calls.' (R. 93). All contracts are executed by Rollins (NJ) and Rollins (TX) at their respective locations. (R. 96-97), and all processing occurs at their respective facilities. In the case of Rollins (TX), during the audit period, waste was transported to the Rollins (TX) plant via customer delivery or common carrier. Rollins (TX) did not have any trucks during the audit period. (R. 69). (See also, Determination, Finding of Fact '6,' p. 4).
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> "Under the above-described circumstances, unlike those present in General Electric case, Rollins (NJ) and Rollins (TX) have no presence in New York, and, as such, lack a 'substantial nexus' to the State sufficient to support the imposition of sales tax liability" (Petitioners' reply brief, pp. 13-15).

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).

During the audit period, wastes generated by various customers of Rollins were transported to the Rollins (NJ) and Rollins (TX) plants via customer delivery, common carrier or, in the case of Rollins (NJ), by one of four Rollins (NJ) trucks. The Division asserts tax on the charges for the transportation, treatment and disposal only in this last category, i.e., when the waste is picked up by petitioners' own vehicles. The Division concedes that the treatment and disposal charges

are exempt when delivered to petitioners' waste facility by common carrier and by the customer itself.

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.[7] On this point, it is 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 notwithstanding 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.

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

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[7]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 proceeding in the nature of either certiorari or mandamus."

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. Thus, there is no risk of duplicate taxation by another state, if that state's law is identical to New York's Tax Law. We cannot agree. The result of the Division's position is that under a similar statutory scheme, New Jersey and Texas, respectively, would be precluded from taxing the processing of the waste in New Jersey and Texas 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.[8] Moreover, we find no discernible legal basis for the Division's position.

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

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[8]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 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."

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 and Texas had the same law, then each 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 and Texas.

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 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:

> "8. The tax in question also complies with the external consistency test set forth in federal case law. Since petitioners have not shown any actual double taxation, there is no need for any apportionment between states. Furthermore, since there will be no possibility of double taxation even if other states enact taxing statutes like that of New York, implementation of the New York statute does not require any apportionment. The subject provision must therefore be found to be externally consistent, as that term is used in the Goldberg case.
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> "9. Accordingly, a proper analysis of the statutory provision leading to the taxes imposed herein shows that said provision meets the external and internal consistency tests set forth by the United States Supreme Court, and is therefore fairly apportioned. Since the subject statute also satisfies the other three criteria set forth in Complete Auto Transit v. Brady [430 US 274], the taxes at issue in this case do not violate the Commerce Clause of the United States Constitution" (Division's exception, Rider, pp. 2-3).

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.[9]

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[9]Specifically, the Court in Goldberg stated:

> "[w]e doubt that States through which the telephone call's electronic signals

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 and Texas, 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 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 and Texas

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> 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].
>
> "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].
>
> "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).

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 and Texas to tax the processing which takes place in those states. 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.

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 petitions of Rollins Environmental Services (NJ), Inc. and Rollins Environmental Services (TX), Inc. are granted;

4. The notices of determination issued to Rollins Environmental Services (NJ) dated March 6, 1989 are cancelled; and

5. The notices of determination issued to Rollins Environmental Services (TX) dated July 14, 1989 and July 19, 1989 are cancelled.

DATED: Troy, New York
September 15, 1994

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

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