STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
C.I.D. REFUSE SERVICE, INC.	:	DECISION DTA No. 809934
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 March 1, 1987 through January 28, 1990.	:	

Petitioner C.I.D. Refuse Service, Inc., 10860 Olean Road, Chaffee, New York 14030, filed an exception to the determination of the Administrative Law Judge issued on October 6, 1994. Petitioner appeared by Cohen & Lombardo, P.C. (Donald A. Fisher, Esq., of counsel) and Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Mark S. Klein and Michel P. Cassier, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner also filed a reply brief. Oral argument was heard on July 13, 1995, which date began the six-month period for the issuance of this decision.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether petitioner's purchase of waste containers were purchases for resale within the meaning of Tax Law § 1101(b)(4) and, thus, not subject to the imposition of sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "6" and "12" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner, C.I.D. Refuse Service, Inc., operates a garbage collection service. Its income was derived from providing service to three groups of customers: commercial, industrial and domestic. Petitioner maintained a separate sales journal for each type of customer. However, petitionerreported all of its sales on the same sales tax return. All of petitioner's purchase and expense records were kept at the same location.

On the basis of a field audit, the Division of Taxation ("Division") determined that sales and use taxes in the amount of $931.39 were due on additional taxable sales. The Division also found that tax in the amount of $1,072.12 was due on expense purchases. Lastly, the Division concluded that tax in the amount of $27,493.66 was due on asset purchases of $343,670.15. The asset purchases consisted of miscellaneous asset acquisitions and of purchases of containers. The miscellaneous asset acquisitions by petitioner resulted in tax due of $1,829.51. The remaining amount of tax of $25,664.15 was the amount that the Division found was due on container purchases. The Division concluded that petitioner's purchase of containers was taxable because they were not being resold but were being used for a service.

After the audit, petitioner agreed with all of the audit findings except for the tax due on container purchases.

The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 30, 1990, which assessed sales and use taxes in the amount of $25,664.15, plus interest of $5,548.40, for a total amount due of $31,212.55. Since petitioner agreed with a portion of the audit, the amount of tax which the Division assessed in the notice

was based on the amount of tax which the Division contends is due on petitioner's purchase of containers.

The letters C.I.D. in petitioner's name stand for the three types of customers which petitioner services -- commercial, industrial and domestic. Petitioner has a separate department for each type of service.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> Each department has separate equipment and separate drivers. In general, a driver is assigned his own truck and works in one of the three departments. Nevertheless, there are occasions where a driver is used interchangeably between departments. However, containers are not interchanged between departments.[1]

There are different billing practices for each of the departments. Industrial businesses are billed monthly for services previously rendered. Commercial businesses are billed monthly for services to be rendered. Domestic customers are billed twice a year.

Petitioner does not bill its domestic customers for rentals. However, commercial and industrial customers are issued bills which separately state a rental charge.

Each container is assigned a number which is reflected in a journal which shows the size of the container, the date purchased and whether the container is assigned. If the container is assigned, the journal also shows to whom the container is assigned.

Containers can be rented for one year or three years. Petitioner's contract with its customers for commercial and domestic waste provided, in part:

> "**CUSTOMER'S DUTIES AND LIABILITY.** The equipment shall be in the possession and control of the Customer. Customer agrees to hold harmless and indemnify Contractor against all claims, lawsuits and any other liability for death or injury to persons, or damage to property arising out of the possession or use of the equipment by the Customer, including any liability for negligence. Customer shall be responsible for the cleanliness and safekeeping of the equipment. 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 it. Customer shall not make any

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[1] We modified finding of fact "6" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

> alterations or improvements to the equipment without the prior written consent of the Contractor."

During the period March 1, 1987 through December 31, 1987, petitioner's commercial customers paid rental charges of $127,099.77 which were 17.1% of total commercial revenues of $745,350.12. For the year 1988, petitioner's commercial customers paid rental charges of $162,400.66 which were 17.1% of total commercial revenues of $948,120.06. For the year 1989, petitioner's commercial customers paid rental charges of $125,462.08 which were 14.7% of total commercial revenues of $852,179.52. The foregoing percentages do not reflect customers who were charged only for rentals and not a service.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> During the period in issue, petitioner had approximately 1,500 commercial customers. Approximately 10% of the customers rented containers without an associated service. At the hearing, petitioner's president testified that, although he could not recall it happening, it was possible for a container to be used by a customer for a rental without trash removal service and then by the same or another customer for rental with trash removal service. The number assigned to a container would not change if the container were transferred from one customer who had only a rental to another customer who had both a rental and a service. Petitioner's records would indicate who had that numbered container. He also explained that a container was not designated as only a rental container.[2]

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[2] Finding of fact "12" of the Administrative Law Judge's determination read as follows:

> During the period in issue, petitioner had approximately 1,500 commercial customers. Approximately 10% of the customers rented containers without an associated service. At the hearing, petitioner's president testified that, although he could not recall it happening, it was possible for a container to be used for only rental purposes with one customer and, at a later time, the same container could be used by the same or another customer in conjunction with a service. The number assigned to a container would not change if the container were transferred from one customer who had only a rental to another customer who had both a rental and a service. Petitioner's records would indicate who had that numbered container. He also explained that a container was not designated as only a rental container.

We modified the third sentence of this fact to more accurately reflect the record.

In addition to the facts found by the Administrative Law Judge, we find the following:

> The Field Audit Report (Exhibit "D") did not contain any workpapers to explain the basis of the auditor's calculation of the additional tax asserted due on the containers at issue. There is no indication in the record whether such containers were purchased for the domestic, industrial or commercial departments of petitioner. On questioning, the auditor had only a vague recollection of petitioner's business. He could not recall specifically how petitioner's accounts were set up or whether containers purchased for one department were used in another department. All of petitioner's evidence relates to containers used for its commercial customers. Therefore, it will be presumed that all the additional tax asserted due relates to trash containers purchased for use in the commercial department.

OPINION

Section 1105(a) of the Tax Law provides that sales tax is imposed upon the receipts from every retail sale of tangible personal property. During the period at issue, Tax Law § 1101(b)(4)(i) defined a "retail sale" as:

> "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

Removal of trash from real property is a taxable service pursuant to section 1105(c)(5).

Based on evidence in the record, the Administrative Law Judge found that: [d]uring the period in issue, petitioner had approximately 1,500 commercial customers. Approximately 10% of the customers rented containers without an associated service" (Determination, finding of fact "12"). The Administrative Law Judge found that petitioner issued its commercial customers "bills which separately stated a rental charge" (Determination, finding of fact "8"). He concluded that the rental of the trash containers was a significant part of petitioner's business (Determination, conclusion of law "D"). He rejected the Division's position that the rental activity was merely incidental to the trash removal services provided (Determination, conclusion of law "C") and concluded that petitioner's rental business was independent of the trash removal services (Determination, conclusion of law "D").

However, the Administrative Law Judge went on to conclude that:

> "although it may never have happened, it was possible for customers to start out renting a container and decide later that they also wanted a service using the same container. Since petitioner was willing to use its containers interchangeably, the purchase of all of the containers was subject to sales and use taxes" (Determination, conclusion of law "F").

Further, the Administrative Law Judge concluded that:

> "[a]n additional consideration supporting the Division's conclusion that the purchase of the containers is taxable is that the phrase 'actually transferred' means a permanent transfer (Waste Management of New York v. Tax Appeals Tribunal, 185 AD2d 479, 585 NYS2d 883, lv denied 80 NY2d 762, 592 NYS2d 670). In this instance, the terms of petitioner's contract with its customers establish that the containers are not permanently transferred to the customer" (Determination, conclusion of law "G").

On exception, petitioner argues that the Administrative Law Judge correctly determined that the rental of the trash containers was independent of the provision of the trash removal services. However, this is inconsistent with his later conclusion that the containers had not been purchased exclusively for purposes of resale because a container could be used by a "rental only" customer and a customer who both rented a container and paid for trash removal services. Petitioner argues that even if there were such an interchange of containers, it would be of no consequence since in each case the customer would still be renting the trash container from petitioner.

The Division argues that the Administrative Law Judge correctly concluded that the purchase of the containers is subject to tax. It argues that the rental of the containers is part of an integrated trash removal service. Since the containers can be interchanged between rental only customers and those who rent containers as part of the trash removal service, they were not purchased exclusively for resale. Therefore, the taxability of their purchase must be determined pursuant to section 1101(b)(4)(i)(B) and not section 1101(b)(4)(i)(A). The Division maintains that the containers were not "actually transferred" to the purchaser of the service in conjunction with the performance of the trash removal service as required by Tax Law § 1101(b)(4)(i)(B) in order for the purchases of the containers to be exempt from tax. Since the containers remain

the property of petitioner pursuant to the customer agreement (Exhibit "3"), the purchase of the containers is a retail sale.

We reverse the determination of the Administrative Law Judge.

First, the Division argues that petitioner provides trash containers as part of an integrated trash removal service. However, this argument was specifically rejected by the Administrative Law Judge. The Administrative Law Judge concluded that the containers were rented to petitioner's commercial customers and that these rentals were independent of and not incidental to petitioner's trash removal services. This conclusion is supported by the record and neither party took exception to it. However, it is evident that the Administrative Law Judge's determination in this matter, in particular, conclusion of law "G," has generated some confusion as to what the issue on exception is. For purposes of clarification, we will discuss the issue of an integrated trash removal service and, to that end, we will deny petitioner's request to strike those parts of the Division's brief that deal with this issue.

Petitioner's burden of proof to establish an exclusion from the definition of a "retail sale" is well established through case law.

In Matter of Albany Calcium Light Co. v. State Tax Commn. (44 NY2d 986, 408 NYS2d 333), the issue was whether cylinders used by the petitioner to deliver gas to its customers were exempt from sales tax when they were purchased. The Court noted that while the sales and use tax law does not define the term "resale," it appeared that "a purchaser who acquires an item for the purpose of sale or rental (Tax Law, § 1101, subd. [b], par. [5]) purchases it for resale within the meaning of the statute" (Matter of Albany Calcium Light Co. v. State Tax Commn. supra, 408 NYS2d 333, 334). The Court concluded that just because the gas was delivered in a cylinder, the customer was not necessarily renting the cylinder absent a specified charge for that rental. Rental fees charged for retaining the cylinders beyond a certain period of time does not mean that the cylinders were purchased for the purpose of rental. The Court stated that "[i]t should not fall within judicial 'decisional analysis' to determine what is or is not a rental" (Matter of Albany Calcium Light Co. v. State Tax Commn., supra, 408 NYS2d 333, 334).

In Matter of U-Need-A-Roll Off Corp. v. New York State Tax Commn. (67 NY2d 690, 499 NYS2d 921), the Court determined that while the petitioner might rent a trash container without providing trash removal service, the petitioner's customers were charged a flat fee for trash removal services without stating a separate rental charge for the use of containers. The Court, relying on its decision in Albany Calcium, held that there was substantial evidence to support the determination of the Tax Commission that the containers at issue were not rented.

In Matter of Niagara Lubricant Co. v. State Tax Commn. (120 AD2d 885, 502 NYS2d 312, lv denied 68 NY2d 607, 506 NYS2d 1031), the petitioner claimed that painting and cleaning services performed on its re-usable 55-gallon drums were purchased for the purposes of resale. The Appellate Division, relying on Albany Calcium, stated that: "[t]he mere fact that petitioner's customers' lubricants were delivered in drums does not establish that its customers were renting the drums absent a showing that the customers were charged a specific price for the use of those drums" (Matter of Niagara Lubricant Co. v. State Tax Commn., supra, 502 NYS2d 312, 314).

In Matter of Micheli Contr. Corp. v. New York State Tax Commn. (109 AD2d 957, 486 NYS2d 448), the petitioner leased or purchased construction equipment and, in some cases, re-leased it but also used some of it in its own business operations. The Appellate Division, relying on Albany Calcium, upheld the Tax Commission's determination that, in order for the purchase of equipment to be exempt from taxation as a sale for resale, it must have been purchased exclusively for resale or re-lease. A mixed use of equipment between petitioner's own use and the leasing of such equipment to third parties does not satisfy this requirement.

In Matter of Valley Welding Supply Co. v. Chu (131 AD2d 917, 516 NYS2d 366), the petitioner sold industrial gases to its customers in cylinders. It offered customers several options for the use of the cylinders and charged a separate and distinct fee for the gas itself. Rental of cylinders represented a significant portion of the petitioner's revenue. However, one of the customer use options was a demurrage plan. It allowed use of a cylinder for up to 30 days without charge. The Court found the Tax Commission's conclusion that this demurrage

option was not a cylinder rental to be reasonable. "Inasmuch as all of petitioner's cylinders were used interchangeably and petitioner has failed to demonstrate what portion, if any, of its cylinders were used exclusively for resale purposes, the Tax Commission cannot be faulted for interpreting the Tax Law so as to conclude that the purchase of all the cylinders was a taxable transaction" Matter of Valley Welding Supply Co. v. Chu, supra, 516 NYS2d 366, 368).

In Matter of AGL Welding Supply Co. (Tax Appeals Tribunal, April 28, 1994), this Tribunal considered the petitioner's claim that its purchases of gas cylinders were sales for resale. The petitioner separately invoiced its customers for rental of cylinders and sales of gas. Under facts similar to the demurrage option in Valley Welding, the Tribunal concluded that all of the petitioner's cylinder purchases were not made exclusively for the purpose of resale. Since the petitioner failed to demonstrate what portion of its cylinders were used exclusively for resale purposes, the purchases of all of its cylinders were subject to tax.

In Matter of Waste Management of New York v. Tax Appeals Tribunal (supra), the Appellate Division affirmed a decision of this Tribunal that the petitioner's purchases of trash containers were taxable. The petitioner was found to provide the containers as part of its waste removal service. Therefore, to acquire these containers without sales tax liability, it was necessary that the containers be "actually transferred" to the customers as part of the trash removal service pursuant to Tax Law § 1101(b)(4)(i)(B). The Tribunal concluded that no "actual transfer" occurred because the containers remained the property of the petitioner and they could be reused by the petitioner.

These cases demonstrate that for the purchases of petitioner's trash containers to be non-taxable pursuant to Tax Law § 1101(b)(4)(i)(A), petitioner must prove that there is a specified charge to its customers for the rental of the containers, that the containers are not used interchangeably for rental and non-rental purposes and that the containers were purchased exclusively for resale/rental. If there is not a resale/rental of the property and the property is used in performing the taxable trash removal service, Tax Law § 1101(b)(4)(i)(B) requires that

the property be "actually transferred" to the purchaser of the service in order for the purchase of the containers to be non-taxable.

In this case, the Administrative Law Judge determined, and we agree, that petitioner has met its burden of proving that it rented trash containers to each of its commercial customers and that the rental was independent of the provision of trash removal services and not part of an integrated trash removal service. The customer invoices contained a specified rental charge, the rental activity was a significant part of petitioner's business and the rental charges were unaffected by whether or not the customers also used petitioner's trash removal services or the volume of the service used.

We agree with petitioner that since the containers were rented to all of petitioner's commercial customers (i.e., those who used petitioner's trash removal services and those who only rented containers), the possible interchange of containers between each type of customer would not affect the taxability of the purchase of the containers. In either case, the containers were purchased and used exclusively for customer rental. Therefore, the purchases of the containers are excluded from the definition of a retail sale pursuant to Tax Law § 1101(b)(4)(i)(A) and are not subject to sales tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of C.I.D. Refuse Service, Inc. is granted;

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

3. The petition of C.I.D. Refuse Service, Inc. is granted; and

4. The Notice of Determination dated August 30, 1990 is cancelled.

DATED: Troy, New York
August 31, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner