STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARISOL, INC.	:	DECISION DTA No. 811226
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1985 through November 30, 1988.	:	

Petitioner Marisol, Inc., 125 Factory Lane, Middlesex, New Jersey 08846, filed an exception to the determination of the Administrative Law Judge issued on September 8, 1994. Petitioner appeared by Urbach, Kahn & Werlin, P.C. (David L. Evans, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert J. Jarvis, Esq., of counsel).

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

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

ISSUE

Whether petitioner has shown by clear and convincing evidence that its removal of used or spent industrial chemicals from its customers' business premises located in New York State and its transporting of said chemicals to its plant in New Jersey for recycling is not subject to tax as trash or garbage removal.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3" and "5" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

During all relevant periods, Marisol, Inc. ("Marisol" or "petitioner") was a corporation having its plant and offices in the State of New Jersey and doing business in the State of New York. Marisol is engaged in recycling various used or "spent" chemical waste. Petitioner operates pursuant to environmental protection laws and regulations governing the proper handling of hazardous materials. Examples of the type of chemical waste Marisol deals with include oil, degreasers, antifreeze, paintstrippers and common industrial solvents, mineral spirits and acetone (referred to infra, variously as "chemical waste" or "hazardous waste" or "waste material").[1] These chemical wastes are the by-products of various industrial and manufacturing processes of petitioner's customers. After petitioner obtains the chemical waste, it is treated (recycled) to remove contaminants and the recycled product is sold by petitioner.

Petitioner obtains the chemical waste from its customers in various states, including New York.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> When petitioner is notified that a company has chemical waste it wants removed, petitioner and the customer discuss the price for removal. The price arrived at depends upon the type of material, the market value for recovered material and petitioner's expected profit. Then, a sample of the material is normally required. This sample is analyzed by petitioner in its New Jersey laboratory to insure that it is material that petitioner is permitted to handle and that it is recoverable. If the material is acceptable to petitioner, petitioner arranges to have one of its trucks, or a common carrier, pick up the waste and transport it from the New York customer's plant to petitioner's plant in New Jersey.[2]

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[1]While petitioner objects to use of the term "hazardous waste", instead preferring the term "raw product", its objection does not appear to be that the chemicals involved are not "hazardous", but rather that they are not "waste". However, a review of petitioner's exhibits shows that its own internal documents routinely refer to these chemicals as various types of "hazardous waste", "flammable waste" or "chemical waste" (Ex. "4", "5", "6" and "9").

[2]Finding of fact "3" of the Administrative Law Judge's determination read as follows:

> "When petitioner is notified that a company has chemical waste it wants removed, petitioner arranges to have one of its trucks, or a common carrier, pick

(continued...)

Petitioner's customers (sometimes infra, "waste generators") are notified prior to the removal of the chemicals that the customer must ship the chemicals in containers approved by the United States Department of Transportation with a complete Hazardous Waste Label. If the material is flammable, a "Flammable Label" must also be attached.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> Material is generally received at Marisol's plant in either bulk tank wagons or 55-gallon drums. Due to the nature of the chemical waste, all shipping to Marisol is done on a hazardous materials manifest system. At petitioner's on-site laboratory, a sample of the material is analyzed to make sure that it matches the pre-shipment sample. If the chemical waste conforms to the pre-shipment specifications, it is unloaded and the manifest is signed. If the material does not meet these specifications, the customer is notified and the material normally goes back to the customer. Not until satisfactory completion of the testing and petitioner's signing of the manifest evidencing its acceptance does title to the material transfer to petitioner. Petitioner has seven days to complete necessary testing and to accept or reject the chemical waste material.[3]

Depending on the chemical waste that has been accepted for recycling, various recycling processes are utilized by Marisol. During the audit period, petitioner recycled 100 percent of the

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[2](...continued)

> up the waste and transport it from the New York customer's plant to petitioner's plant in New Jersey.*
>
> * Sometimes petitioner's customers arrange and pay for their own transportation of the chemical waste to petitioner's plant. However, no tax was asserted on these transactions."

We modify this finding of fact in order to more fully reflect the record.

[3]Finding of fact "5" of the Administrative Law Judge's determination read as follows:

> "Material is generally received at Marisol's plant in either bulk tank wagons or 55-gallon drums. Due to the nature of the chemical waste, all shipping to Marisol is done on a hazardous materials manifest system. Bulk material is analyzed before unloading at petitioner's on-site laboratory. If the chemical waste meets Marisol's recycling criteria, it is accepted and the manifest is signed. Not until satisfactory completion of the testing and petitioner's signing of the manifest evidencing its acceptance, does title to the material transfer to petitioner. Petitioner has seven days to complete necessary testing and to accept or reject the chemical waste material."

We modify this finding of fact in order to more fully reflect the record.

chemical waste it accepted. None of the tax asserted in this proceeding was asserted on petitioner's "processing" or "recycling" activities in New Jersey.

Exhibits "5" and "6" are bid letters from petitioner to AT & T and IBM, respectively, and are representative of petitioner's pricing. For example, Exhibit "5" states:

"AT &T Waste Stream No.	Cost for Disposal
NESC-1 Waste Oil	As Specified--$60.00/drum Over 2% Chlorine or Over 10% Water-$90.00/drum
NESC-2 Oil & Flux	As Specified--$60.00/drum Over 2% Chlorine or Over 10% Water-$90.00/drum"

The right hand column is an example of what petitioner charged AT & T to pick up and remove waste oil, and the amount charged would vary depending on the chlorine and water content. On the other hand, sometimes, depending on the percentage and quality of a recycled chemical that could be recovered and the price it could be sold for by petitioner, petitioner may pay a nominal amount to its customer for chemical waste.

Petitioner's invoices and bid letters charged its customers for removal of the waste material plus an amount for "freight" or "transportation" or "hauling". The transportation or freight charge was not always separately stated (see, e.g., Exhibits "5" and "6"; tr., p. 67). Some of petitioner's customers prefer to have everything, including transportation, worked into one price. Even in those situations where petitioner paid its customer a nominal amount for its waste chemicals, the customer still paid a freight or transportation charge for having the chemical picked up and transported by petitioner, or its designated common carrier, to petitioner's plant.

The audit in this proceeding asserted no tax on amounts petitioner paid when it purchased waste chemicals, and no tax was asserted on amounts petitioner received when it sold the recycled products. The only invoices upon which tax was asserted here were those for waste or trash removal and associated freight and transportation charges.

At the time petitioner picked up the chemical waste from its customer, the chemical belonged to that customer. The chemical waste remained the property of the customer during transport through New York and even after it was delivered to petitioner's plant. The chemical

waste did not become the property of petitioner, if at all, until after it was analyzed for content and acceptance by petitioner was signified by signing of the manifest. Such analysis could take several days.

On or about December 15, 1988, the Division of Taxation ("Division") undertook an audit of petitioner's books and records. The Division's auditor, Angelo Spano, sent an appointment letter dated December 28, 1988 to petitioner, which requested that specified books and records covering the audit period be made available for audit. The requested books and records were made available, reviewed by the auditor and it was concluded that they were adequate to conduct a detailed audit.

The audit reflects, and Ms. Barnes testified, that petitioner was providing its customers with a waste hauling service. The auditor examined each of petitioner's invoices for the audit period reflecting New York State customers. Since petitioner was not charging its New York customers sales tax on its removal and transportation services, any of petitioner's invoices issued to New York customers charging for chemical waste removal and transportation or freight were assessed. It is undisputed that none of the invoices upon which tax was asserted included a charge for processing or recycling.

Petitioner's removal of the chemical waste from its New York customers' facilities and the transporting of it to New Jersey are characterized in the record as "solvent removal", "hauling of chemical waste", "transportation" or "freight" (Ex. "5", "6", "10"; Ex. "D"). The audit shows, and Ms. Barnes testified, that the tax asserted in this proceeding is based solely on the integrated service of waste removal and freight and/or transportation charges paid to petitioner by its customers (tr., p. 119). No tax was asserted on processing charges (id.). In addition, no tax was asserted on: (i) the amounts paid by petitioner to New York customers for the purchase of waste chemicals; or (ii) the amounts paid to petitioner upon the sale of recycled chemicals.

During the audit period, petitioner was not a registered vendor in New York State pursuant to Article 28 of the Tax Law and so was not entitled to issue resale certificates.

Prior to issuance of an assessment, a conference was held with James Nerger,[4] on behalf of Marisol, the auditor and the auditor's team leader, Stephen Klimow. At this meeting, documentation was provided by petitioner which permitted adjustments to the audit; however, no agreement could be reached by the parties with regard to the taxability of petitioner's services. It was suggested at that meeting that petitioner request an Advisory Opinion from the Division. On November 20, 1989, petitioner requested an Advisory Opinion as to whether it was providing a taxable service.

Petitioner's request for Advisory Opinion argued that it was not subject to tax using various alternative, sometimes inconsistent, sometimes irrelevant, arguments, i.e.: (a) its purchase of waste chemicals was exempt as a purchase for resale; (b) under Tax Law § 1115(d), its services otherwise taxable in New York are exempt because the tangible property upon which the services were performed is delivered to the purchaser outside New York for use outside of New York; or (c) that the waste generators (petitioner's customers) continue to own the chemicals during transport to New Jersey and during the "recovery" (recycling) process and that petitioner is not disposing of the waste, "but merely processing it for the generator" (emphasis added).[5] The evidence in this record presented by petitioner shows that the latter statement is a misstatement of fact which necessarily sullies petitioner's case.

Based on information provided by petitioner, an Advisory Opinion (No S891205D) was issued on April 16, 1990. The Advisory Opinion supported the auditor's position and concluded that petitioner's charges for removing and transporting chemical waste from the real property of its New York customers was an integrated service within the scope of Tax Law § 1105(c)(5). Since the tax is imposed upon the servicing of real property located in New York, the opinion

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[4]A power of attorney filed in this matter and running from Marisol, Inc. to David Evans is signed by H. Peter Nerger, president of Marisol.

[5]It is noted that the request for Advisory Opinion, and consequently the Advisory Opinion itself, addressed the question as to whether the "processing" of the waste chemicals was subject to tax. Similarly, although the evidence at hearing was that no tax was asserted on charges for "processing" as a component of the integrated service here, petitioner nevertheless continues to argue that "processing" is not properly subject to tax. The Division's brief, in turn, responds to this argument with its own. Such arguments on issues that are precluded by the facts in the record are not helpful or commendable and further the interests of neither party.

stated, "it is immaterial that the material being picked up is recyclable or that it is delivered outside of New York State."

Based upon petitioner's invoices showing charges for chemical waste removal from New York customers' real property and charges for freight and transportation to petitioner's New Jersey plant, the audit determined that petitioner had additional taxable sales of $322,875.91. As a result of the audit, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 10, 1991 asserting sales tax in the amount of $18,835.29, plus penalty and interest.

A short conference was held on October 10, 1990, with James Nerger, Angelo Spano and Stephen Klimow, the team leader. On February 13, 1991, a second conference was held with James Nerger, his accountants, Jim Daniels and David Evans, Mr. Spano and Stephen Klimow. At this meeting, petitioner continued to disagree with the tax asserted. Petitioner and its accountants argued that the method of obtaining a product, i.e., the chemical waste, was immaterial, as the product was for resale and exempt under New York's resale provisions.

Petitioner filed a timely request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On July 17, 1992, a Conciliation Order (CMS No. 114022) was issued to petitioner cancelling penalties, but otherwise sustaining the notice of determination.

Petitioner thereupon filed a timely petition with the Division of Tax Appeals and the instant proceeding ensued.

THE HEARING

The auditor, Mr. Spano, could not attend the hearing in this matter due to recent spinal surgery. Mr. Klimow, his supervisor and team leader, could not attend the hearing because he was out of the country. Ms. Dorothy Barnes ("Barnes"), Section Head for the Division's Binghamton District Office, appeared as the Division's only witness.

At hearing, Mr. Evans objected to introduction of the Notice of Hearing, arguing that there was no testimony supporting "that document" or to show that it had ever been mailed or delivered.

When asked by the Administrative Law Judge if he was denying that he received the Notice of Hearing, Mr. Evans replied "I am not here to provide testimony" (tr., p. 4). Official notice was taken that Mr. Evans and Mr. Nerger appeared for petitioner on the date and time set for the hearing.

Mr. Evans also repeatedly objected to Ms. Barnes' testimony on the grounds of hearsay. Ms. Barnes' knowledge, he said, was based only on her review of the audit file and her discussions with Mr. Spano and Mr. Klimow, and was not based on her "direct knowledge." Consequently, Mr. Evans urged, at hearing and in his brief, that Ms. Barnes did not qualify as a competent witness and her testimony could not be the foundation for introduction of the audit report.

Mr. Evans argued that Ms. Barnes was not competent to testify because she was not really familiar with the audit. Mr. Evans asked Ms. Barnes on cross examination for "illustrative examples out of the audit workpapers of where Marisol was not charged sales tax in a transaction it dealt with a New York vendor" (tr., pp. 41-43). Ms. Barnes responded with two examples from page 10 of the audit workpapers.

Later, Mr. Evans, in his direct questioning of James Nerger, referred him to the same two examples on page 10 of the audit workpapers (tr., pp. 77-78; Ex. "D", workpaper, p. 10). Mr. Nerger stated that the transactions referred to by Ms. Barnes actually involved situations where Marisol sold chemicals to New York customers where no tax had been asserted.

When asked the relevance of this line of questioning, Mr. Evans stated that it went "to the credibility" of Ms. Barnes, "who despite the protestations she is familiar with the file, . . . point[ed] to two specific examples of situations where product was picked up in New York and no tax was charged."

Unfortunately, that was not the question posed by Mr. Evans to Ms. Barnes. Mr. Evans' question was whether Ms. Barnes could give examples where Marisol had not been charged sales tax in a transaction with a New York customer (tr., pp. 40-43). Ms. Barnes answered the question asked. Ms. Barnes' response, among others, demonstrated that she was thoroughly familiar with the audit.

Mr. Evans, at hearing and in his brief, also objected to introduction of the audit report based on the fact that Ms. Barnes had not signed the cover sheet. Evans urged that since Barnes' knowledge of the audit was not "direct knowledge" and she did not sign the audit cover sheet, Ms. Barnes' testimony could not constitute a proper foundation for introduction of the audit report and workpapers. Since the audit was not properly before the Administrative Law Judge, Mr. Evans argues, the Division has failed to put in any evidence to prove a rational basis for the assessment.

As of the date of hearing, petitioner had not indicated to the Division that there was any disagreement as to the facts of this case. At hearing, in order to clarify the issues in dispute, the Administrative Law Judge asked Mr. Evans if there was a disagreement on the facts. Mr. Evans claimed he did not know (tr., pp. 18-19).

Petitioner did not attempt to rebut any of the Division's factual showings. By the conclusion of the hearing, it was clear that there was no disagreement on the facts between the parties. The sole disagreement in this matter is how those facts should be interpreted, i.e., whether petitioner's services constituted an integrated trash removal service for purposes of Tax Law § 1105(c)(5) or a purchase for resale.

The audit methodology, audit computations and audit results were not raised as an issue by the petition, at hearing or in the briefs.

OPINION

In his determination, the Administrative Law Judge concluded that the chemicals which petitioner removed from the premises of its New York customers were trash or waste with no more than nominal value. Petitioner was thus engaged in performing an integrated trash removal

service from buildings located in New York. He determined that the Division had demonstrated a rational basis for the assessment at issue and since the only activities subject to tax were integrated maintenance services to real property located within New York State, the Administrative Law Judge found no violation of the interstate commerce clause.

Petitioner has taken exception to numerous findings of fact and conclusions of law contained in the Administrative Law Judge's determination. Its arguments on exception are the same as it presented to the Administrative Law Judge and can be summarized as follows:

(a) Petitioner's activities do not constitute an integrated waste removal service. Petitioner purchases the used chemicals for resale. Petitioner acquires materials from New York manufacturers, continues the manufacturing process by its own processing of the materials and changes all the acquired material into saleable products;

(b) The imposition of sales tax by New York on such transactions is unconstitutional under the Tax Appeals Tribunal decision in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992); and

(c) The Division has failed to show that the tax asserted has a rational basis. The Division's witness was incompetent because her testimony was based solely on hearsay. She had no direct, personal knowledge of the audit and since the auditor was not present to testify, petitioner has been deprived of its right to appropriately cross-examine or otherwise explore the documents offered by the Division and has therefore been denied due process and equal protection of the law.

The Division argues, in opposition, that the Administrative Law Judge correctly determined that the services rendered by petitioner were an integrated trash removal service subject to sales and use tax rather than purchases for resale. The Division argues that the processing of the used chemicals is undertaken at petitioner's plant in New Jersey and that all processing is done for the benefit of petitioner, not for the benefit of petitioner's customers. Relying on Matter of Auburn Steel Co. (Tax Appeals Tribunal, September 13, 1990), the Division argues that the chemical waste transported by petitioner does not cease to be trash

simply because some part of it may have value to the disposal company. The Division argues that in the hands of its New York customers, the chemicals were merely waste by-products of manufacturing with, at most, nominal value. It is clear, the Division argues, that these materials have little or no value to the New York customers because these customers pay to have these materials removed from their facilities. The Division argues that because no tax was imposed on petitioner's out-of-state processing services, Matter of General Electric Co. (supra) is not applicable to a decision in this matter. Further, the Division argues that there was a rational basis for the assessment and that the Division's witness was competent to testify.

Tax Law § 1105(c)(5) imposes a tax on the receipts from every sale, except for resale, of the service of "[m]aintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law . . . ."

The Division's regulations provide:

> "[m]aintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal" (20 NYCRR 527.7[a][1]; emphasis added).

Before determining whether the removal and transportation of used chemicals by petitioner for its New York State customers is taxable under Tax Law § 1105(c)(5), we must decide whether or not the used chemicals removed and transported may be accurately classified as "trash" or "garbage" under 20 NYCRR 527.7(a)(1). On this issue, we disagree with the Administrative Law Judge.

The Administrative Law Judge issued his determination in this matter prior to our decision in Matter of Seneca Foods Corp. (Tax Appeals Tribunal, July 6, 1995). For the reasons that follow, we believe that our decision in that matter is controlling here.

In Seneca Foods, the petitioner was in the food processing business. In the course of its business, it generated significant food by-products consisting of apple pomace, corn husks and green bean by-products as well as "food by-product sludge" which it sought to dispose of. The

owners of two local working farms removed these by-products from the petitioner's food processing plant for use on their own farms. The apple pomace, corn husks and green bean by-products were fed to cows, along with corn silage and hay. The food by-product sludge was applied to cornfields as a fertilizer.

The petitioner in Seneca Foods paid approximately $10.00 per ton in connection with the transportation of the apple pomace, corn husks and green bean by-products and approximately $11.59 per ton in connection with the transportation of the food processing sludge. In contrast, the petitioner paid approximately $37.91 per ton for the hauling and disposal of its trash and garbage.

The petitioner in Seneca Foods disputed that it owed tax on amounts it paid for the disposition of these food by-products from its food processing facilities, claiming that such amounts were not paid for the removal and disposal of trash or garbage. The petitioner contended that because the food by-products were used as animal feed and fertilizer, the payments made to transport the food by-products did not constitute payments for trash or garbage removal. Relying on arguments similar to those made in the present case, the Division contended that these food by-products were trash or garbage because they had no value to the petitioner and that payments made to pick up, transport and dispose of these food by-products constituted payments for trash or garbage removal subject to sales tax pursuant to Tax Law § 1105(c)(5) and 20 NYCRR 527.7(a)(1). We agreed with the petitioner. We held that:

> "The crux of the matter is whether the food by-products and sludge are 'trash' within the meaning of section 1105(c)(5). We agree with the Administrative Law Judge that resolution of this issue depends on whether the food by-products and sludge have value. We rely on Matter of Tonawanda Tank Transport Serv. v. Tax Appeals Tribunal (168 AD2d 748, 563 NYS2d 900). In Tonawanda, the Court found that:
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> > '[p]etitioner cites no persuasive authority to support its contention that property must be abandoned by its owner before it can be considered trash. Notably, rather than labeling trash as abandoned property, the dictionary defines it [i.e., trash] as "something worth relatively little or nothing" (Webster's Third New International Dictionary 2432 [unabridged 1981]). This definition is consistent

> with the Court of Appeals' implicit finding in Matter of Rochester Gas & Elec. Corp. v. State Tax Commn., 71 NY2d 931, 528 NYS2d 810 and Matter of Cecos Intl. v. State Tax Commn., 71 NY2d 934, 528 NYS2d 811 that hazardous waste was equivalent to "trash" under the tax law' (Matter of Tonawanda Tank Transport Serv. v. Tax Appeals Tribunal, supra, 563 NYS2d 900, 901, emphasis added).

"The Court in Tonawanda rejected the petitioner's attempt to distinguish itself from the taxpayers in Rochester and Cecos on the basis that it did not operate a disposal facility. The Court stated 'that transportation of a nonuseful product such as hazardous waste by itself is a taxable service under the statute' (Matter of Tonawanda Tank Transport Serv. v. Tax Appeals Tribunal, supra, 563 NYS2d 900, 901, emphasis added). The clear implication of the decision is that if the property at issue has value, it is not trash.[6]

"The facts in the case are clear -- the food by-products and sludge have economic value as feed and fertilizer to farmers Schreiber and Dickson, who used the food by-products and sludge in place of more expensive products on the market which would have been purchased from other sources. In short, unlike ordinary trash which is disposed of at a waste disposal facility, the food by-products and the sludge serve a useful function. The dollar value of the food by-products and sludge is reflected in the statements from both farmers to the effect that their charges represented the difference between their expense in picking up and transporting the food by-products and sludge and the value of the food by-products and sludge . . . .

"We are not persuaded by the proposition advanced by the Division that the property at issue must have value to the 'person who initially holds the property. That is, the question is whether the property has value to its owner . . . . The test of value is who is paid. If the owner pays to be rid of the property by definition, it has no value' (Division's brief, p. 11). First, we find nothing in the case law which supports this proposition. The cases merely focus on whether the property has economic value. Second, the Division's proposition, carried to its logical extreme, is that any property moved for a fee has no value, a result for which we find no basis" (Matter of Seneca Foods Corp., supra).

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[6]"In Matter of Auburn Steel Co. (supra), which preceded the Court decision in Tonawanda, we rejected Auburn's assertion that the dust at issue was not trash because it had value. We stated that '[t]here is no evidence in the record of the actual economic value of the dust to the disposal sites.' We also found no evidence to support Auburn's assertion that a measure of the dust's value is that its disposal costs would have been more if it had used a different disposal solution. 'The disposal charges for the two different disposal sites used during the audit period were not on their face substantially different.' We concluded that petitioner was not selling the dust to the disposal sites but was paying the disposal sites to take the dust. 'Thus, the charges for transporting the dust are properly classified as trash removal services and not as transportation charges for transporting a useful product from one location to another' (Matter of Auburn Steel Co., supra)."

Although the Division argues in the present matter that, prior to November 1986, a portion of the used chemicals were disposed of without being recycled, this is not in accord with finding of fact "6" of the Administrative Law Judge's determination which states: "[d]uring the audit period, petitioner recycled 100 percent of the chemical waste it accepted." We find ample support for this finding of fact in the testimony of petitioner's witness. The entire nature of petitioner's operation indicates that petitioner is only interested in obtaining used chemicals for which it has a market. Prior to accepting any used chemicals, a sample of a potential customer's chemicals is taken for analysis. Then, future shipments of used chemicals are not accepted until testing reveals that they are consistent with the pre-shipment sample and are fully recoverable. Thus, like the food by-products in Matter of Seneca Foods Corp. (supra), all of the chemicals obtained from Marisol's New York customers were removed and transported for the use and benefit of Marisol.

As in Seneca Foods, the resolution of whether the used chemicals are "trash" within the meaning of Tax Law § 1105(c)(5) depends on whether the used chemicals have value. Here, like in Seneca Foods, it is clear that the materials had economic value to petitioner. The only chemicals accepted by petitioner were those for which it had a market. As petitioner's witness testified, the price paid by the customer or to the customer was dictated by the cost to recover the material, the market for the recovered material and petitioner's anticipated profit. Petitioner is in the business of reclaiming and reselling chemicals, not the removal and transport of trash and garbage for mere disposal. Thus, we conclude that the materials removed and transported by petitioner from its New York customers were not "trash" within the meaning of Tax Law § 1105(c)(5).

In Seneca Foods, although the cost of transporting the food by-products exceeded their value, we did not find that this transformed a transportation service into a waste removal service, relying on the decision of the former State Tax Commission in Matter of Diaz Chemical (State Tax Commission, November 20, 1986). In Diaz, the petitioner produced wet sulfuric acid as a by-product which could be used to make ammonium sulfate for fertilizer. The petitioner sold as

much of the wet sulfuric acid as possible and disposed of the rest. The State Tax Commission decided that the removal of wet sulfuric acid from Diaz's facility for disposal "falls within the category of trash removal and is maintenance and service of real property within the meaning and intent of section 1105(c)(5) of the Tax Law" (Matter of Diaz Chemical, supra). The shipping of the wet sulfuric acid to customers which purchased it and utilized it in the production of ammonium sulfate constituted a transportation service and not maintenance and service to the petitioner's property. As to the sales to those customers, the Commission found that:

> "[t]he requirement that petitioner bear the shipping cost was part of the sales agreements between petitioner and the purchasers, and the fact that these costs exceeded the sales price does not transform the transportation service into a waste removal service" (Matter of Diaz Chemical, supra).

In the present case, while the cost of transportation was borne by the customers and may have exceeded the price paid by Marisol for the chemical products, this does not transform petitioner's transportation service into a waste removal service.

As a result, we reverse the determination of the Administrative Law Judge and grant the petition of Marisol. Since our decision on this issue is dispositive of this matter, it is unnecessary to decide the remaining issues raised by petitioner on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marisol, Inc. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Marisol, Inc. is granted; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 20, 1991 is cancelled.

DATED: Troy, New York
January 4, 1996

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

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

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