STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MODERN DISPOSAL SERVICES, INC.	:	DECISION DTA No. 812565
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1986 through November 30, 1989.	:	

Petitioner Modern Disposal Services, Inc., 4746 Model City Road, P.O. Box 209, Model City, New York 14107-0209, filed an exception to the determination of the Administrative Law Judge issued on August 10, 1995. Petitioner appeared by Magavern, Kanaley, Rich & Bencini, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Petitioner filed a letter in lieu of a brief in support. The Division of Taxation filed a brief in opposition. Petitioner's letter in lieu of a reply brief was received on November 24, 1995 and began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs and Commissioner DeWitt concurs but for the reasons set forth in a separate decision.

ISSUE

Whether petitioner's purchase of waste containers and compactors ("containers"), used in its waste removal business, is taxable, or whether such purchase is exempt from sales tax as a purchase for resale under Tax Law § 1101(b)(4)(i)(A).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "21" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Modern Disposal Services, Inc., was, during the period in question, engaged in the business of waste collection, removal, transportation and disposal ("collection and removal") within the State of New York.

As part of its waste collection and removal business, petitioner provides waste containers to its customers. These containers vary in size. The fee charged to petitioner's customers varies with the size of the container, i.e., the larger the container, the larger the fee. The record does not contain a copy of any resale certificates for petitioner as vendor, in connection with the purchases of these containers.

Petitioner's comptroller, David Kyser, testified. Mr. Kyser stated that a number of elements go into the total cost charged petitioner's customers, i.e., a rental fee for the containers, a disposal cost and transportation cost.

Mr. Kyser stated that rental fees and fees for waste removal service are separately stated on petitioner's invoices and on quotes to customers (tr., p. 15). Not all of the documents offered in evidence by petitioner support that testimony. Rental fees for containers, says Mr. Kyser, do not depend on a customer's using petitioner's waste removal service.

With respect to whether petitioner's customers could rent containers without utilizing its trash removal services, Mr. Kyser stated, "It could happen. Yes" (tr., p. 16). Petitioner offered no evidence as to the extent of petitioner's business that falls within this category.

Most often, however, petitioner provides waste removal and collection services to the customers for whom it provides containers.

Petitioner offered sample copies of customer purchase orders, its invoices, correspondence with customers stating billing information, bid proposals and service

agreements with its customers (collectively "contracts"). Petitioner would accept a purchase order as a contract (tr., p. 41), but it also had its own forms for service agreements.

One of petitioner's contract provisions states, inter alia, that:

> "All equipment furnished by the Contractor [petitioner] 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" (Division's Exhibit "G" [emphasis added]).

When containers and waste removal service are both provided, containers are placed on the customer's property and remain there. The customer has unrestricted access to and use of the container(s). When filled with waste, the containers, depending on the type, are either emptied into one of petitioner's trucks and hauled away, or the container itself is picked up by petitioner, hauled off, emptied and returned to the customer's property for further use.

Petitioner's documents in evidence sometimes separately state the charge for rental of containers.

Petitioner's invoices sometimes specify a combined fee for "supply and service" of a container without separately stating a rental fee (Petitioner's Exhibit "1", p. 2).

Some of petitioner's invoices describe a container, e.g., "40 cubic yard open top container", with a corresponding fee "per haul" without any rental charge stated for the container (Petitioner's Exhibit "1," p. 2).

Some of petitioner's invoices describe a container with a corresponding fee, but do not specify whether the fee is for waste removal, rental of the container, or both (Petitioner's Exhibit "3," p. 4).

Some of petitioner's invoices reflect that a customer has been provided with several different sizes or types of containers, but only set forth a rental charge of a single type. Those without the separately-stated rental charge have a specified fee "per pick up" or "per ton" (Petitioner's Exhibit "7").

The Division of Taxation ("Division") conducted an audit of the books and records of petitioner for the audit period. Petitioner's witness, Mr. Kyser, testified that the auditor was

provided with the invoices evidencing the purchase of containers (tr., p. 18; Division's Exhibit "F," workpaper # 2). The audit report indicates that petitioner's purchase records were adequate.

The audit resulted in sales tax due of $67,302.67 on additional audited sales of $961,465.28. Audit of petitioner's tax accrual account found $2,594.00 in tax that had been accrued but not paid.

The audit report and workpapers show that an audit was conducted of petitioner's asset purchase invoices including container purchases. Although there is no request for records in the field audit report, the audit of petitioner's asset purchases was conducted in detail. This portion of the audit resulted in additional tax of $74,107.39 on asset purchases of $1,058,677.00.

Petitioner signed a consent agreeing to the additional tax of $81,193.48[1] plus minimum interest asserted under Notice of Determination No. S901031001E, which represented tax asserted on additional sales, the accrual account and a portion of the tax asserted on assets purchases (Division's Exhibit "F", pp. 4-5 of Audit Report). This portion of the audit is not in dispute.[2]

Petitioner disagrees with additional tax of $62,810.58 plus minimum interest asserted on its asset purchases by Notice of Determination No. S901031000E (Division's Exhibits "C", "F", Schedule B). As noted, supra, this portion of the audit was conducted in detail.

Petitioner filed a timely request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services.

A Conciliation Order (CMS No. 110757) dated October 22, 1993 was issued to petitioner sustaining the tax asserted on asset purchases asserted by Notice No. S901031000E.

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[1]A portion of the tax agreed to by petitioner included tax asserted on non-container asset purchases.

[2]$11,664.77 of this tax asserted on additional sales was arrived at by using a one-year test of sales (Division's Exhibit "F," audit report, p. 2). Since there is no request for records in the hearing record, that could have compromised this portion of the assessment, except that petitioner has agreed to it and signed a consent.

Thereupon, petitioner filed a petition with the Division of Tax Appeals and the instant proceeding ensued.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> Petitioner at hearing and in its post-hearing brief raised fundamental problems with the audit method, specifically the failure of the Division to request petitioner's books and records. In his comments at the close of the hearing the Administrative Law Judge indicated that he was leaving the record open for petitioner to submit additional documents. In addition, he stated to the Division's representative, Mr. Connolly:
>
> "ALJ Jenkins: At the beginning of this hearing I agreed to hold the record open to permit the Petitioner to submit additional documents if it wished. The documents we talked about, of course, are copies of contracts or the lease agreements showing the terms of those agreements. That's optional. You don't have to.
>
> "I also am leaving the record open for the same period of time to Mr. Connolly. I think you got a problem with this case, Mr. Connolly. I'm going to tell you right up front.
>
> "I don't see any copies of a request for records in that audit file. If there's no request for documents in that audit, we've got a little problem here.
>
> "Mr. Connolly: Well, your Honor, the only thing is that, you know, we agreed there's only one issue here.
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> "ALJ Jenkins: If there's no request for documents, you've got an issue with me. Because I know, I mean you know that. You know --
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> "Mr. Connolly: Well, I do know that's generally an issue, but --
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> "ALJ Jenkins: You know in a sales tax case, if you don't request documents, that's fatal to your assessment.
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> "Mr. Connolly: Okay, your Honor. I would just point out that was not raised by Mr. Kanaley, it was not raised --
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> "ALJ Jenkins: I'm raising it now to give you an opportunity to deal with that, the same way we raised the issue for Mr. Kanaley to deal with whatever he wants to deal with on the contracts and the leases.
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> "In fairness to both of you, I want to have a complete record. I don't want to surprise you at the last minute and say, 'Whoops. Okay. You screwed up,' or whoever. I know it's not your fault

> cause there's no request for records. But I want both sides to be aware of it.
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> "Mr. Connolly: OK. Fair enough" (Tr., pp. 111-113).

In his post-hearing letter to the Administrative Law Judge, dated November 30, 1994, the Division's representative indicated that there was no request for records but that in his opinion none was necessary because this was not an estimated audit but a detailed audit of petitioner's purchase records.[3]

At the time of the hearing in this matter, Angelo Gazzo, the auditor in this matter, had retired, and both of his then supervisors (John McKusker and Robert Sicconalfi) were deceased. However, Thomas Riggs, subsequent Team Leader in the Sales Tax Section of the Division's Buffalo District Office, gave an affidavit as to Mr. Gazzo's and his participation in preparation of the audit papers. The audit report and workpapers, in relevant part, were attached to the Riggs affidavit (Division's Exhibit "F"). Petitioner had no objection to the affidavit or the audit report and workpapers being received in evidence (tr., pp. 8-9).

The Riggs affidavit stated that he had no part in the actual audit, but did help prepare some of the paper work. Mr. Riggs signed the audit cover sheet as Team Leader. He reviewed the audit report and workpapers in preparation for a conference before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Page WP-2 of the audit workpapers is the detailed audit of petitioner's asset purchase invoices. Mr. Riggs crossed out the amounts in the "Add'l Tax Due" column for each invoice, the taxability of which petitioner agreed to, i.e., non-container asset purchases.

OPINION

The Administrative Law Judge found the facts in this case similar to the facts in Matter of Waste Mgt. of New York (Tax Appeals Tribunal, March 21, 1991, affd Matter of Waste Mgt.

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[3] Finding of fact "21" of the Administrative Law Judge's determination read as follows:

> "No dispute as to the audit methodology or audit calculations was raised at hearing or in the petition."

We modify this fact by eliminating it completely because it does not accurately reflect the arguments made by petitioner at hearing concerning the audit methodology followed by the Division.

of New York v. Tax Appeals Tribunal, 185 AD2d 479, 585 NYS2d 883, lv denied 80 NY2d 762, 592 NYS2d 670) and concluded that petitioner failed to show that the containers at issue were purchased exclusively for resale.

> "[I]t was incumbent upon petitioner to establish the extent to which its containers were rented separately and not as part of its taxable trash removal service [cites omitted].
>
> "In light of the requirement that each container purchased or rented by petitioner be used exclusively for resale (rental) in order for petitioner to avoid the tax here, petitioner must establish that its billing invoices separately state a rental fee for each container provided to its customers [cites omitted]. The evidence submitted by petitioner does not show that it charged a rental fee for each container. If a separate rental fee was charged for some containers and not others, then petitioner's burden was to show what portion of, i.e. to what extent, its containers were used exclusively for rental (resale) purposes. Petitioner has not met its burden, so the purchase of all of its containers is subject to sales tax" (Determination, conclusions of law "K" and "L").

On exception, petitioner raises the same fundamental problem with the audit methodology of the Division that it raised at hearing before the Administrative Law Judge, namely, that the Division did not request the books and records of petitioner and did not examine any of petitioner's rental records to determine if the assets which petitioner asserts were purchased for resale were actually resold by petitioner.

The core of petitioner's argument is reflected in the following passage from its brief at hearing:

> "[a]s was noted by the Administrative Law Judge, the auditor did not review and request books and records (T: 111-112). As noted by the Division's counsel, in a letter dated November 30, 1994, a lack of a record request is significant where the Division has estimated a taxpayer's sales tax liability [cite omitted]. Contrary to the assertions in Counsel's letter, the auditor did not rely on the Petitioner's books and records. The auditor looked at those books and records representing the purchase side of the transactions at issue, while ignoring documents made available, which spoke to the disposition side of these transactions (T: 19). Thus, the auditor's conclusions are infected with the very same virus as any estimated audit, as a review of the disposition and usage side of the transaction may have caused at least some, if not all, of the transactions to fall into the category asserted by Petitioner herein, i.e., a sale.
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> * * *
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> "In the instant case, records for an exact assessment were available and ignored" (Petitioner's hearing brief, pp. 3-5, emphasis added).

Petitioner also asserts that the situation here parallels that in Matter of C.I.D. Refuse Serv. (Tax Appeals Tribunal, August 31, 1995). Petitioner alleges that the facts found by the Administrative Law Judge do not take into account:

> "an entire class of transactions, known as 'on call', where there is no relationship to the trash removal service and the rental of containers (tr., pp. 59-61, 75). Indeed, on page 75 of the transcript, petitioner's witness says '. . . most definitely yes . . .' when asked about rentals without services. In these situations a customer is free to totally abandon the removal service, even to have a competitor of the petitioner perform such, while still renting the container from petitioner. It is noteworthy that petitioner's witness in the case at hand was far more definite with regard to rental without service than was the witness in C.I.D." (Petitioner's letter in lieu of brief in support, p. 1).

Petitioner alleges that the findings of fact by the Administrative Law Judge that petitioner's documents in evidence sometimes separately state the charge for rental of containers:

> "mischaracterizes the evidence. As noted in [petitioner's reply brief at hearing] Division's counsel had to scour the audit papers and exhibits to find exceptions to petitioner's general practice of separately charging for rent of containers. This mischaracterization carries forth for [findings of fact] 11 through 15" (Petitioner's letter in lieu of brief in support, pp. 1-2).

We deal first with petitioner's assertion on exception that the failure of the Division to request and examine petitioner's records concerning the resale of assets purchased by petitioner requires that the assessment be cancelled.

We agree with petitioner and reverse the determination of the Administrative Law Judge.

The law is clear that, "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-

80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43; Matter of Christ Cella, Inc. v. State Tax Commn., supra), "from which the exact amount of tax due can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liqs. v. State Tax Commn., supra).

The issue in this case is whether petitioner purchased the assets in question for resale. The obvious way to resolve this issue is for the Division to determine what petitioner did with the assets after they were purchased, i.e., to conduct an audit of petitioner's sales records. This determination must be based on an examination of petitioner's books and records as they relate to sales to determine their adequacy and whether they support petitioner's assertion that the assets were purchased for resale. The uncontroverted fact in this case is that this was not done, rather the Division assumed that none of petitioner's assets were purchased for resale. Thus, the Division estimated petitioner's tax liability, something which is not permitted under the facts of the case.

We reject the implication in the determination of the Administrative Law Judge that because the courts have held that trash removal is an integrated service that a person engaged in

such business cannot purchase assets exclusively for resale. In Matter of C.I.D. Refuse Serv. (supra), we reviewed the case law dealing with this issue and concluded that:

> "[t]hese 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" (Matter of C.I.D. Refuse Serv., supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Modern Disposal Services, Inc. is granted;

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

3. The petition of Modern Disposal Services, Inc. is granted; and

4. The Notice of Determination No. S901031000E, dated October 22, 1990, is cancelled.

DATED: Troy, New York
May 23, 1996

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

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

Commissioner DeWitt concurring:

I concur in the result reached by the majority in this matter but for the reasons set forth below.

I do not agree with the majority's conclusion that the failure by the Division to request the books and records of petitioner at the commencement of the audit is dispositive of this case. The Administrative Law Judge found and the majority accepted the findings of fact that:

> "[t]he Division of Taxation ('Division') conducted an audit of the books and records of petitioner for the audit period. Petitioner's witness, Mr. Kyser, testified that the auditor was provided with the invoices evidencing the purchase of containers (tr., p. 18; Division's Exhibit 'F,' workpaper #2). The audit report indicates that petitioner's purchase records were adequate.
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> * * *
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> "The audit report and workpapers show that an audit was conducted of petitioners asset purchase invoices including container purchases. Although there is no request for records in the field audit report, the audit of petitioner's asset purchases was conducted in detail" (Determination, Findings of fact "15" and "16").

From the lack of detail in the audit report and based on the testimony of petitioner's witness, it appears that the auditor failed to review the sales invoices given by petitioner to its customers in order to ascertain how petitioner employed the containers and compactors it had purchased. Based on statements in his audit report, the auditor merely concluded that all of petitioner's asset purchases were taxable, relying on the decisions in U-Need-A-Roll Off Corp. v. New York State Tax Commn. (67 NY2d 690, 499 NYS2d 921) and Jackson Welding Co. (TSB-A-86[46]S).

Although the auditor ignored certain of petitioner's records in determining what transactions were taxable, he did not estimate the amount of additional tax liability by using a representative sample of petitioner's records, an observation test or by resorting to external indices. It is obvious from the audit workpapers in the record that the auditor calculated the amount of petitioner's additional tax liability solely from petitioner's own purchase invoices. As a result, I disagree with the holding of the majority that the auditor improperly estimated petitioner's tax liability in this matter. Matter of Chartair, Inc. v. State Tax Commn. (65 AD2d 44, 411 NYS2d 41) or its progeny, as cited by the majority, have no application to this situation.

It must be noted that the Administrative Law Judge's determination was rendered prior to our decision in Matter of CID Refuse Serv. (Tax Appeals Tribunal, August 31, 1995). In that decision, we stated that in order for a petitioner to demonstrate that its purchases of trash containers were non-taxable:

(a) rental charges to customers must be specified;

(b) containers must not be used interchangeably for rental/non-rental purposes; and

(c) containers must be purchased exclusively for resale.

If property is used in the performance of the taxable trash removal service (and not used exclusively for rental/resale), the property must be actually transferred to the purchaser.

In the instant matter, petitioner has shown through its testimony and documentary evidence that it consistently charged its customers a rental charge for containers and compactors; that it separately stated the charge for such rentals; and that it used its compactors and containers exclusively for rental/resale purposes. Although the Administrative Law Judge found that each of petitioner's documents did not separately state rental charges, the documentation presented by petitioner shows that each of its representative customers was separately charged rental fees for their use of containers and compactors. Petitioner's evidence is sufficient to meet its burden in this case. The audit report offered by the Division in support of the assessment did not in any way conflict with or refute petitioner's testimony or documents. As a result, I would reverse the determination of the Administrative Law Judge and grant the relief requested by petitioner.

DATED: Troy, New York
May 23, 1996

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