STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CWM CHEMICAL SERVICES, INC. **AND** **CWM CHEMICAL SERVICES, LLC**	:	DECISION DTA NO. 818757
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1998 through November 30, 2000.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 12, 2002 with respect to the petition of CWM Chemical Services, Inc. and CWM Chemical Services, LLC, 1550 Balmer Road, P.O. Box 200, Model City, New York 14107-0200. Petitioners appeared by Buchanan Ingersoll (Daniel M. Darragh, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioners filed a brief in opposition. Oral argument, at the Division of Taxation's request, was heard on June 11, 2003 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether there exists sufficient nexus to support the imposition of sales tax on all or some apportioned part of petitioners' receipts for removing, transporting, processing and disposing of hazardous waste where a part of the transport, as well as the processing and disposal services occur in New York, but where the waste is initially located at an out-of-state real property site from which it is removed and transported into New York State.

II. Whether, assuming such sufficient nexus exists, the Division of Taxation upon audit properly apportioned the imposition of sales tax to the treatment and disposal segments of the service which occurred in New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Prior to February 28, 1999, petitioner, CWM Chemicals Services, Inc. ("CWM"), was a Delaware corporation qualified to do business in the State of New York, and it was the owner and operator of a duly licensed hazardous waste treatment, storage and disposal facility, located on Balmer Road in the Town of Porter, Niagara County, New York and known as the Model City Facility. Thereafter, CWM changed its form from a "C" corporation to a Delaware limited liability company, also registered to do business in the State of New York, and CWM Chemical Services, LLC (also referred to as "CWM") then owned and operated the Model City Facility.

The Model City Facility has been issued permits from the New York State Department of Environmental Conservation and the United States Environmental Protection Agency relating to the receipt, storage, treatment and disposal of a wide variety of liquid, solid and semi-solid

industrial and hazardous wastes, including certain types of PCB wastes. The facility permits have been issued pursuant to the Resource Conservation and Recovery Act, 42 USC §§ 6901, *et seq*., the Federal Water Pollution Control Act, 33 USC §§ 1251 *et seq*., the Clean Air Act, 42 USC §§ 7401 *et seq*., the Toxic Substances Control Act, 15 USC §§ 2601 *et seq*., and various provisions of the New York Environmental Conservation Law and its implementing regulations related to hazardous waste management and disposal, point source discharges, and air emissions.

The services offered by CWM at or related to the Model City Facility include waste pickup or collection at the customer's property, transportation of the waste to the Model City Facility in duly licensed vehicles, various forms of treatment such as stabilization, neutralization and precipitation, and land disposal. Customers may elect to have their wastes picked up at their property and transported to the Model City Facility for treatment and disposal, or they can elect to deliver their wastes to CWM at the Model City Facility for treatment and disposal. In most instances where CWM provides waste pickup, the transportation vehicle is provided by a subcontractor hired and paid by CWM, and CWM provides resale certificates to such subcontractors. Upon arrival at the Model City Facility, whether by CWM pickup or delivery by the customer, the waste is subject to CWM's waste receipt acceptance procedures to verify that the waste being received conforms to the contract documents and the waste manifest.

Pursuant to the terms of CWM's Standard Form Environmental Service Agreement, CWM takes title to the customer's waste either upon completion of loading into CWM's transportation vehicle at the customer's property, or, if the customer transports its waste to the Model City Facility, upon acceptance of the waste at the facility.

CWM's customers are located within New York State, as well as in a number of other states. When CWM picks up a New York customer's waste at its property in New York and transports it to the Model City Facility for treatment and disposal, CWM, as provided in New York Tax Law § 1105(c)(5), collects New York sales tax on the total receipts for transportation, treatment and disposal, with the tax rate determined by the rate applicable in the county where the customer's property is located. When a customer transports its waste to the Model City Facility for treatment and disposal, CWM, as provided in Tax Law § 1105(c)(2), collects New York sales tax at the Niagara County rate on the total receipts for treatment and disposal. When a customer delivers its waste to the Model City Facility for disposal only, no sales tax is collected because none is due under either section 1105(c)(2) or (5). When CWM picks up a non-New York customer's waste at its property located in another state and transports the waste to the Model City Facility for treatment and disposal, CWM does not collect or pay any New York sales tax on any part of the receipts from the transaction.

The Division of Taxation ("Division") conducted audits of CWM's sales tax returns for the periods March 1, 1998 through February 28, 1999 and March 1, 1999 through November 30, 2000. The Division identified CWM's transactions with its out-of-state customers where CWM picked up the waste at the customer's out-of-state property and transported it to the Model City Facility for treatment and disposal. Typically, though not always, the customer was billed at an out-of-state address and payment came from an out-of-state address. CWM had not collected or paid any sales tax on receipts from any such transactions. The Division asserted that sales tax, pursuant to Tax Law § 1105(c)(5), was due on the in-State portion of the receipts from such transactions, and the Division determined that the receipts for treatment and disposal would

fairly represent that portion of the revenues attributable to New York activity. During the course of the audit CWM provided the auditors with a March 12, 2001 letter from its counsel explaining why CWM believed that the interstate transactions in question were not subject to tax. The Division provided its response in a letter dated July 5, 2001.

Because of the very large number of records CWM would have had to review in order to identify and produce the documents related to each out-of-state customer transaction during the entire period under audit, CWM proposed that the Division use a test period audit method. The Division and CWM agreed to use May 2000 as the sample month, and CWM provided the documents requested by the Division for the transactions that occurred during that month. The Division also requested and was provided data regarding CWM's stabilization cost center revenues for the entire audit period.

CWM's stabilization cost center revenues represent the revenues paid by customers specifically related to treatment and disposal services. If a transaction involved disposal only or transportation and disposal, no part of those revenues was allocated to the stabilization cost center. If a transaction involved transportation, treatment and disposal or simply treatment and disposal, the revenues attributable to the treatment and disposal services were allocated to the stabilization cost center.

Using information from the sample month, the Division determined that 12.45% of the stabilization cost center revenues represented the revenues that would be attributable to the treatment and disposal services rendered by CWM for its out-of-state customers where CWM picked up the waste at the customer's out-of-state property and transported the waste to the Model City Facility for treatment and disposal. With regard to those transactions, the Division

asserted that the portion of the revenues attributable to treatment and disposal was taxable under Tax Law § 1105(c)(5), as representing the New York portion of the transaction, and it then calculated sales tax, at the Niagara County rate of 7%, on the stabilization cost center revenues attributable to CWM's transactions with its out-of-state customers involving waste pickup out of state and transportation to the Model City Facility for treatment and disposal. The Division excluded from its sales tax calculation the revenues received by CWM for the pick up and transportation component of those services, attributing that portion of the revenues to non-New York activity.

On September 17, 2001, the Division issued to each petitioner a notice of determination. These notices, based upon the methodology described above, assessed sales tax in the amount of $83,514.74 for the period March 1, 1998 through February 28, 1999, and in the amount of $171,347.28 for the period March 1, 1999 through November 30, 2000, plus interest.

CWM does not agree that any sales tax is due on the waste treatment and disposal services that it provided to its customers where the waste was picked up at the customer's out-of-state property and transported to the Model City Facility for treatment and disposal, nor does it agree that the Division has the authority to determine an appropriate allocation of any tax that might be imposed on such interstate transaction or that the allocation determined by the Division is appropriate. However, for purposes of this proceeding, in the event that it is determined that a sales tax is due on such transactions, and that the Division has the authority to determine the appropriate allocation, CWM does not challenge the methodology used by the Division to conduct the audit, nor does CWM challenge the calculations performed by the Division to determine the amount of sales tax that might by assessed on the transactions in question.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Addressing the relevant law, the Administrative Law Judge noted that Tax Law § 1105(c)(2) and (5) imposes sales tax on receipts from sales of the following services, including:

> (2) Producing, fabricating, *processing* . . . tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.
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> (5) *Maintaining, servicing or repairing real property, property or land . . . whether the services are performed in or outside of a building*, as distinguished from adding to or improving such real property, property or land, by a capital improvement . . . but excluding (i) services rendered by an individual who is not in a regular trade or business offering his services to the public . . . (emphasis added).

The Administrative Law Judge found that the services contracted for between petitioners and their customers are those which involve petitioners' removal of hazardous waste from its customers' out-of-state real property, including transporting such waste to petitioners' Niagara County facility for treatment and disposal which constitutes the integrated service of maintenance to real property taxable under Tax Law § 1105(c)(5) and 20 NYCRR 527.7(a)(1). The Administrative Law Judge noted that attempts to segregate such an integrated maintenance service into its various component services, in general as well as by specific invoicing of the component parts, have been rejected (***Matter of Penfold v. State Tax Commn.,*** 114 AD2d 696, 494 NYS2d 552). The Administrative Law Judge observed that the Tax Law and the courts have drawn a distinction between a waste generator who pays someone to perform a maintenance service upon its real property versus a waste generator who brings its waste to a facility either for treatment and disposal or simply for disposal. In the former instance, the entire waste removal

process consisting of pickup, transportation, treatment and disposal is considered a single integrated real property maintenance service. The Administrative Law Judge pointed out that this service transaction occurs and is delivered at the situs of the customer's real property, and the tax due thereon pursuant to Tax Law § 1105(c)(5) is calculated based on the tax rate applicable in the county where the real property being serviced is located. However, the Administrative Law Judge stated that, in the second situation, where waste is delivered by the customer to the disposal facility for treatment and disposal, the customer is only purchasing a treatment and disposal service. This service, taxable under Tax Law § 1105(c)(2), is delivered and the sale transaction (i.e., treatment and disposal) occurs at the location of the disposal company's facility, with the tax calculated based upon the tax rate applicable in the county where the treatment and disposal facility is located.

The Administrative Law Judge discussed ***Matter of General Electric Co.*** (Tax Appeals Tribunal, March 5, 1992) which involved an integrated real property maintenance service of removal, transportation, treatment and disposal of industrial or hazardous waste from a customer's New York property subject to tax under Tax Law § 1105(c)(5). In ***General Electric***, the real property maintenance service was performed for a New York customer with respect to that customer's New York real property. Thus, the Tribunal found sufficient nexus in ***General Electric*** between the taxable service transaction, the in-State real property, the customer purchasing the integrated real property maintenance service, and New York State to support the imposition of tax on the entire receipt for such service. However, the Tribunal nonetheless went on to conclude that taxing the entire receipt, when a portion of the integrated service occurred outside of New York State, would violate the Commerce Clause of the United States

Constitution for failure of proper apportionment. In reaching this conclusion, the Tribunal reasoned that since the transaction was an interstate transaction with some components thereof occurring in another state, there existed the possibility of multiple taxation of the same activity in violation of the internal and external consistency requirements discussed by the United States Supreme Court in ***Goldberg v. Sweet*** (488 US 252, 102 L Ed 2d 607).

The tax in question, like that in ***Oklahoma Tax Commn. v. Jefferson Lines*** (514 US 175, 131 L Ed 2d 261), is a sales tax. The Administrative Law Judge noted that in ***General Electric*** and its progeny, the Tribunal was concerned by the fact that although the real property being serviced was located in New York State, some portions of the contracted-for service, including the treatment and disposal of the waste, occurred outside of New York State. Without the benefit of the analysis provided by the Supreme Court in ***Jefferson Lines***,[1] the Tribunal concluded that the receipt and the resulting tax must be apportioned so as to reflect the occurrence of such out-of-state activities and avoid violating the Commerce Clause.

The Administrative Law Judge noted ***Jefferson Lines*** involved Oklahoma's imposition of a four percent sales tax on the full purchase price of a ticket for interstate travel sold by a Minnesota bus company doing business in Oklahoma. The ticket was purchased by the customer in Oklahoma and the travel originated in Oklahoma but terminated in another state. The Court held that a state sales tax imposed on the entire unapportioned receipt from the sale of a transportation service originating in the taxing state did not present an undue burden on interstate commerce in violation of the Commerce Clause. In ***Jefferson Lines***, the Administrative Law Judge observed, the Court concluded that the sale of a service, like the sale of goods, has

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[1] ***Jefferson Lines*** was not decided until April 3, 1995.

sufficient nexus to the state in which the sale is consummated to be treated as a local transaction taxable by that state. Since the ticket for interstate travel was purchased in Oklahoma and the service purchased (transportation) commenced in Oklahoma, the Court determined there was sufficient nexus between Oklahoma and the interstate transaction to meet the nexus requirement outlined in ***Complete Auto Transit v. Brady*** (430 US 274, 51 L Ed 2d 326).

The Administrative Law Judge concluded that in the instant matter, nexus focuses on the relationship between New York, the taxable transaction and the purchaser of that service. The Administrative Law Judge noted that petitioners are not selling, and their customers are not buying, a processing and disposal service taxable under Tax Law 1105(c)(2). Rather, petitioners are selling to their customers a real property maintenance service which includes, within its integrated components, a processing and disposal segment. The courts and the New York Tax Law have long recognized the distinction between selling a discrete (c)(2) service and selling a (c)(5) maintenance service to real property (***see***, ***Matter of CECOS Intl. v. State Tax Commn.,*** 126 AD2d 884, 511 NYS2d 174, ***affd*** 71 NY2d 934, 528 NYS2d 811). In this case, the Administrative Law Judge found that the place of sale, the customer and the provision of service at the out-of-state real property leaves no nexus between such discrete taxable event (the sale and service), the taxpayer customer, and New York pursuant to which New York could impose tax on such customer or, as a result, obligate petitioners to collect and remit such tax.

In the alternative, the Division also argued that it could impose sales tax, independently, under Tax Law § 1105(c)(2) on the portion of petitioners' sales receipts derived from the New York segments of the activities performed (processing/treatment and disposal). This argument too was rejected by the Administrative Law Judge. The Administrative Law Judge pointed out

that the transactions at issue are sales of an integrated real property maintenance service and not sales of section 1105(c)(2) processing services. Accordingly, the Administrative Law Judge concluded that New York may not, by apportionment of receipts or otherwise, impose a sales tax on petitioners' out-of-state customers who purchased from petitioners an integrated real property maintenance service to be performed on their out-of-state real property. Thus, the Administrative Law Judge granted petitioners' motion for summary determination.

ARGUMENTS ON EXCEPTION

On exception, the Division claims that the Administrative Law Judge exceeded his authority by relying on the Supreme Court's decision in ***Oklahoma Tax Commn. v. Jefferson Lines*** (***supra***) and not following precedent established by the Tribunal in ***Matter of General Electric Co.*** (***supra***). According to the Division, the holding by the Administrative Law Judge that the facts of this case do not establish a sufficient nexus to support imposition of New York sales tax, is inconsistent with the reasoning and analysis of our decision in ***General Electric***.

In the alternative, the Division also argues that we should "apply the Supreme Court's rational (sic) and holding in ***Jefferson Lines*** to the facts in this case" (Division's brief on exception, pp. 8-9).

The Division also took exception to the Administrative Law Judge's determination rejecting its claim that petitioners' argument was to the facial constitutionality of Tax Law § 1105(c)(5). Since this issue was not argued in the Division's brief, it is deemed abandoned.

In opposition to the exception, petitioners argue that the Administrative Law Judge properly concluded that New York does not have sufficient nexus to impose a sales tax herein and, thus, they request that the determination be sustained.

OPINION

We affirm the determination of the Administrative Law Judge.

Under ***Complete Auto Transit v. Brady*** (***supra***), a state's tax is valid if it is applied to an activity with a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the state. In ***Jefferson Lines***, applying the ***Complete Auto Transit*** test, the Supreme Court held that Oklahoma's sales tax on the full price of a ticket for bus travel from Oklahoma to another state is consistent with the Commerce Clause. The Court held that nexus existed for imposition of Oklahoma's sales tax, since the sales transaction occurred there, i.e., the ticket was purchased there and the transportation service originated there (***see***, ***Oklahoma Tax Commn. v. Jefferson Lines, Inc., supra***). In the context of the sales transactions in issue in this case, nexus focuses on the relationship between New York, the taxable service, the location of the sale, where performance of the service is initiated and the purchaser of that service.

In ***Matter of General Electric Co.*** (***supra***), we determined that New York had sufficient nexus, via the sale of the integrated real property maintenance service to be performed on property located within New York State, to impose sales tax under Tax Law § 1105(c)(5). However, we went on to conclude that taxing the entire receipt, when some components of the integrated service occurred outside of New York State, would be in violation of the Commerce Clause for failure to properly apportion. We reasoned in ***General Electric*** that since the transaction was an interstate transaction with components thereof occurring in more than one jurisdiction, there existed the possibility of multiple taxation of the same activity. Our focus in ***General Electric*** was on the stream of activity making up the integrated service.

In contrast, the Court in ***Jefferson Lines*** properly focused on the time and place of the *sale* of the service and its connection at that time, via the "agreement, payment, and delivery of some of the services," to the taxing jurisdiction (***Oklahoma Tax Commn. v. Jefferson Lines***, ***supra***, 131 L Ed 2d, at 275). The Court noted that "A sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery" (***Oklahoma Tax Commn. v. Jefferson Lines***, ***supra***, 131 L Ed 2d, at 274). The Court noted that the *taxable event is the sale, which occurs at a single time and place*, even when "delivery is made by services provided over time and through space" (***Oklahoma Tax Commn. v. Jefferson Lines***, ***supra***, 131 L Ed 2d, at 275). Under ***Jefferson Lines***, the single imposition of a sales tax with respect to that one event occurs only once and upon only one taxpayer, i.e., the purchaser of the goods or services being sold. Based on this analysis, the Court in ***Jefferson Lines*** concluded, taxing such a purchaser on the full value of the sale's receipt, without apportionment, resulted in no opportunities for multiple taxation of the same taxpayer, since no other time and place can claim to be the site of the sale event.

Applying the foregoing analysis to the facts of this case, New York may not tax the receipts from the transactions at issue. The integrated service herein is a real property maintenance service sold and initially performed on real property located outside of New York State. The sale and delivery of the service commences by pick-up of the waste product from the out-of-state real property and with its removal and transportation thereof. The sale transaction is thus consummated and the performance of the service is initiated outside of New York State. Nexus for imposition of the sales tax on such transactions lies in the state where the real property is located, the sale is consummated and performance of the service is initiated (***see***, ***Oklahoma***

Tax Commn. v. Jefferson Lines, supra). Under the facts of this case, New York lacks the requisite nexus to impose tax under Tax Law § 1105(c)(5) on the sale of the integrated real property maintenance services at issue.

We also reject, for the reasons stated in the determination of the Administrative Law Judge, the Division's argument that it should be entitled to tax some components (i.e., processing and disposal) of the integrated services involved here under Tax Law § 1105(c)(2).

Where a transaction involves an integrated trash removal service, which may include pickup, transportation, processing and disposal of waste, the taxable receipt includes the total amount charged, without any reduction for costs of any component of that integrated service (***see***, ***Matter of CECOS Intl. v. State Tax Commn.***, ***supra***; ***see also***, ***Matter of Penfold v. State Tax Commn.***, ***supra***). Regardless of the taxable status of the individual costs of the components of the service, the vendor's entire receipt is subject to tax if the real property from which the trash is removed is located within this State. The taxed activity is the sale of the service of maintenance of real property. It follows that if the real property is located in this State, performance of the integrated real property service, i.e., removal of the waste from the real property, is initiated here and nexus would lie in New York State. In such event, New York State would be entitled to impose its sales tax on the entire receipt for the integrated real property service even if the processing and disposal portion of the service took place in some other state. Conversely, if the real property is located in another State and performance of the service is initiated there, as in the instant matter, none of the sales receipt is subject to New York State sales tax. If every state in which petitioners' customers were located enacted a sales tax provision identical to Tax Law § 1105(c)(5), there would be no multiple sales taxation of such

customers, since only one state would have the predicate nexus with the localized sales transaction, i.e., a state could only impose sales tax on receipts for integrated real property maintenance services on real property within its borders and wherein the sale occurred and delivery of the service was initiated. Therefore, New York may not impose a sales tax pursuant to Tax Law § 1105(c)(5) on petitioners' out-of-state customers who purchased from petitioners an integrated real property maintenance service to be performed on their out-of-state real property.

In view of the Court's decision and analysis in ***Jefferson Lines***, New York State is without nexus to impose sales tax on the subject transactions. There being no tax, we do not reach the issue of apportionment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petition of CWM Chemical Services, Inc**.** and CWM Chemical Services, LLC is granted; and

4. The notices of determination dated September 17, 2001 are canceled.

DATED: Troy, New York
December 11, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner