STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ISLAND WASTE SERVICES, LTD.	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1999 through November 30, 2005.	:	
	:	DECISION
In the Matter of the Petition	:	DTA Nos. 820978, 820979 AND 821361
of	:	
ISLAND WASTE SERVICES, LTD. F/K/A SELAS ENTERPRISES, LTD.	:	
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, 1997 through November 30, 1999.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 8, 2008 in the matter of the petitions of Island Waste Services, Ltd. and Island Waste Services, Ltd., f/k/a Selas Enterprises, Ltd. Petitioner appeared by Kenneth I. Moore, Esq. and Stephen L. Solomon, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was heard on October 22, 2008 in Troy, New York.

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

ISSUES

I. Whether the removal and transport of trash, including mixed municipal solid waste and construction and demolition debris, to other solid waste management facilities for ultimate disposal, generally out of state, by landfill or burning, after its processing and consolidation at a Long Island solid waste management facility or transfer station, constituted the services of maintaining, servicing or repairing of real property subject to sales tax.

II. Whether a statutory amendment, effective after the period at issue, which provided that services like those at issue here were not taxable services, was a clarification of the existing law indicating that the Division of Taxation's interpretation of the then applicable law was unreasonable.

FINDINGS OF FACT

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

Allied Waste Industries based in Phoenix, Arizona, is a publicly traded, "multi-billion dollar" corporation, with operations in 39 states, including on New York's Long Island, by its subsidiary, petitioner[1] Island Waste Services, Ltd. Allied Waste Industries, along with Browning-Ferris Industries and Waste Management, dominate the waste removal and disposal industry in the United States.

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[1] References in the determination to "petitioner" cover petitioner, Island Waste Services, Ltd., which filed two of the petitions included in the caption of this determination as well as Selas Enterprises, Ltd., which is referenced as petitioner's former name, in one of the three petitions captioned above.

Fees charged for waste removal to home owners, local businesses and local municipalities of solid waste materials including construction and demolition debris represented petitioner's principal source of revenue. Using its own employees, petitioner operated a fleet of approximately 35 vehicles to collect the waste materials from those with whom it had contracted for removal of waste. In addition, petitioner collected fees from other trash removal companies, who dumped solid waste materials that they had collected from their customers at petitioner's Long Island waste transfer station. Petitioner would receive approximately 90 deliveries each day from other trash removal companies.

During the years at issue, Long Island no longer had any municipal solid waste landfills within its own geography. Instead, Long Island's solid waste was generally destined for ultimate disposal in landfills in either Ohio or South Carolina.[2] To prepare for such ultimate disposal out of state, petitioner operated a solid waste management facility, highly regulated by the New York State Department of Environmental Conservation ("DEC"), on Long Island in Holtsville (Suffolk County). This facility has also been referred to by the parties as a "waste transfer station." After collecting waste materials from its customers, petitioner transported these materials to this waste transfer station where the (i) municipal solid waste and (ii) construction and demolition debris were separated and prepared for transportation to their ultimate destinations for disposal. Petitioner's waste transfer station was not a materials recovery facility ("MRF"), and during the audit period never performed an MRF style operation. Petitioner employed from 12 to 15 employees at its Long Island waste transfer facility, including one administrative person, a scale

[2] Although there were no municipal solid waste landfills left on Long Island, there were four incinerators (waste energy plants) in operation. In addition, as noted in the Finding of Fact above, in Brookhaven on Long Island there was a landfill accepting construction and demolition material.

operator who weighed the trucks in and out, heavy equipment operators, and litter pickers and spotters.

Approximately 35 long-haul trucks owned and operated by third-party trucking companies were required each day for the hauling of solid waste materials from petitioner's Long Island waste transfer station to approved facilities, generally out of state as noted above, for ultimate disposal. Petitioner paid these third-party trucking companies to haul these materials from its Long Island facility to the approved disposal facilities. At issue, are sales and use taxes totaling approximately $2.5 million dollars plus interest, which is asserted due by the Division of Taxation ("Division") on petitioner's payments of such hauling charges.

DEC by a permit, with an effective date of November 1, 1995, authorized petitioner to conduct the following activity at its Long Island transfer station:

> Expand existing transfer station with materials separation, recovery and recycling activities for the transfer of up to 600 TPD [tons per day] of mixed solid wastes (MSW) and 2000 cubic yards of construction and demolition [sic] debris (C & D). All separation, sorting and recovery activities shall be conducted inside two separate buildings with MSW in one building and C & D in the other building.

Under petitioner's permit, the mixed solid waste stream was required to be kept separate from the construction and demolition debris stream at all times. All facility activities, including processing, crushing and transferring of material was required to be performed indoors with "[n]o solid waste . . . placed outside the enclosed structure for any purpose, except external storage of recyclables . . . in roll-off containers . . . ." Further, any solid waste gathered was required to be removed "from the site for subsequent transfer to an approved disposal facility" on a daily basis. Limits were placed on the storage of recyclables and construction and demolition debris so that no more than 400 cubic yards of such waste could be stored at the facility at any time. DEC also imposed upon petitioner strict requirements concerning the maintenance of

operational records and reporting, including the requirement to maintain a daily log noting the following information:

> 1. Quantity, type and origin of all solid waste received or transported.
>
> 2. Quantity and destination of all recyclables and residuals transported from the site.
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> 3. [A] log of all collector/transporters which deliver waste to the facility and the date and time of day of each such delivery and the amount of waste so delivered.
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> 4. A notation that [petitioner] has confirmed that each shipment of waste has in fact been received and accepted at a destination Solid Waste Management Facility, authorized to accept such wastes.

The permit described above was renewed and modified by the issuance of a subsequent DEC permit with an effective date of November 1, 2000, which increased from 600 tons to 875 tons per day the amount of mixed Municipal[3] Solid Waste and from 2,000 cubic yards to 2,900 cubic yards per day the amount of construction and demolition debris to be processed at petitioner's Long Island facility. In addition, the bailing of municipal solid waste ("MSW") in an enclosed area was authorized with a maximum of 600 self-contained MSW bales permitted to be stored outdoors for a period not to exceed 60 days. When petitioner's DEC permit was again renewed, with an effective date of November 1, 2005, the daily amount of waste it was authorized to process at its facility remained at the same levels established by the permit with the effective date of November 1, 2000.

At petitioner's Long Island transfer station, the MSW would be compressed, bundled, baled and wrapped to facilitate its transportation by the third-party truckers, as well as to prevent

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[3] It is observed that the terminology used in the later permit was "municipal" solid waste rather than "mixed" solid waste, as noted in the Finding of Fact above. Since the parties in their stipulation of facts use the abbreviation MSW to reference "municipal solid waste," when such abbreviation is used in this determination it will be given such meaning.

odors, leaching, vectors and other nuisances if stored pending shipment. The ratio of contraction was three to one, reducing a load "from size three to size one" with each bale weighing approximately 3,300 pounds, thereby significantly reducing the volume of MSW requiring transport to its ultimate disposal out-of-state.[4] In contrast, construction and demolition debris would be loaded onto a screener so that material measuring two inches and smaller would be shaken out to the bottom. Known as "fines," such material was then used as alternative daily cover at a landfill in nearby Brookhaven on Long Island that accepted construction and demolition debris. The other construction and demolition material would be loaded onto trucks and also hauled away to the landfill in Brookhaven.

The Division issued a Notice of Determination dated May 3, 2001 against Selas Enterprises Ltd., the former name of petitioner, Island Waste Services, Ltd., asserting sales and use tax due of $460,849.19 plus interest for a period of 2 years and 9 months covering 11 sales tax quarters, running from March 1, 1997 through November 30, 1999. The Division then issued a Notice of Determination dated August 12, 2004 against petitioner, Island Waste Services, Ltd., asserting sales and use tax due of $870,706.19 plus interest for a subsequent 3-year period covering 12 sales tax quarters, running from December 1, 1999 through November 30, 2002. Finally, the Division issued a Notice of Determination dated October 16, 2006 against petitioner, Island Waste Services, Ltd., asserting sales and use tax due of $1,211,797.47[5] plus interest for a

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[4] A manual published by the United States Environmental Protection Agency on the subject of Waste Transfer Stations noted the following "primary reason" for using a transfer station: "to reduce the cost of transporting waste to disposal facilities. Consolidating smaller loads from collection vehicles into larger transfer vehicles reduces hauling costs by enabling collection crews to spend less time traveling to and from distant disposal sites and more time collecting waste. This also reduces fuel consumption and collection vehicle maintenance costs, plus produces less overall traffic, air emissions, and road wear."

[5] The parties agree that a payment/credit of $6,664.17 was made against this amount of tax asserted due. Consequently, if petitioner should prevail, it would be entitled to a refund of this amount plus interest.

3-year period covering 12 sales tax quarters, running from December 1, 2002 through November 30, 2005. In sum, the Division has asserted sales and use tax due totaling $2,543,352.70 plus interest against petitioner, Island Waste Services, Ltd. for a period of 8 years and 9 months, which covers 35 sales tax quarters, running from March 1, 1997 through November 30, 2005.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The parties agreed that when petitioner removed waste from its customers' premises in New York, either residential or commercial, it was providing taxable services to its customers of "maintaining, servicing or repairing real property" as provided in Tax Law § 1105(c)(5). Sales tax was imposed and paid on such *integrated* removal, transportation and disposal services that represented the provision of trash removal services to its customers.[6]

The Administrative Law Judge noted that the issue in dispute between the parties was whether petitioner owed sales tax on the charges it paid to third-party trucking companies for the transfer of the solid waste materials from its Long Island transfer station to the approved ultimate disposal facilities, generally out of state.

Petitioner did not dispute the Division's calculations of the amount of sales tax assessed on the transactions in question, but rather challenged the Division's determination that such transactions were taxable in the first instance. The specific question to be addressed was whether, for the subject period, such payments made by petitioner for removal and transport of

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[6] The parties also agreed that petitioner charged and collected sales tax based on the total receipt for the service, with the tax rate determined by the rate applicable in the county where the customer's premises were located. Further, the Division reviewed petitioner's receipts from its customers and accepted petitioner's reporting and payment of sales tax due on such charges during the audit period of eight years and nine months (or 35 sales tax quarters) covered by the three petitions at issue here. In addition, the parties agreed that the dumping charges collected by petitioner from other waste removal companies for the right to dump at its Long Island transfer station were not subject to sales tax.

waste from its Long Island transfer station, constituted maintaining, servicing or repairing real property, thus subject to sales tax pursuant to Tax Law § 1105(c)(5).

The Administrative Law Judge noted that Tax Law § 1105(c)(5) was amended by chapter 321 of the Laws of 2005, effective December 1, 2005 (which is after the period at issue), to expressly exclude from the imposition of sales tax the services at issue here.[7]

Despite the fact that the effective date of the above amendment to Tax Law § 1105(c)(5) started after the period at issue, it was petitioner's argument that the fact that the Legislature amended the statute to expressly exclude such payments from tax did *not* mean that the Division's interpretation of the earlier version of Tax Law § 1105(c)(5) was valid. Put another way, petitioner argued that such waste removal services were exempt from sales tax even before the statute was amended and that the Division had been misinterpreting the statute.

The Administrative Law Judge agreed and found that the legislative history (Governor's Bill Jacket, L 2005, ch 321) established that the Division's pre-amendment interpretation (of Tax Law § 1105[c][5]), as outlined in an advisory opinion issued to Paper Fibres Corp. in May 1997 (TSB-A-97[32][S])(hereinafter "the Advisory Opinion"), was a "strained interpretation of the Tax Law that is beyond that contemplated by the Legislature when it sought to impose a tax on the services of maintaining real property."[8] The Administrative Law Judge went on to find that the 2005 amendment was a mere clarification, not a substantive change.

The Administrative Law Judge found that the transportation of the waste material from petitioner's real property in this case was not done to maintain petitioner's real property, but

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[7] There was no dispute that payments made by a taxpayer for the removal of waste material from a facility such as petitioner's Long Island waste transfer facility have been excluded from sales tax since December 1, 2005.

[8] This language was contained in the bill sponsor's memorandum in support.

rather was part of its obligations as a governmentally regulated waste transfer station permit holder. The Administrative Law Judge found that instead of a taxable "maintaining" or "servicing" of real property, the charges at issue are transportation charges and not a receipt subject to tax.

The Administrative Law Judge thereupon granted both petitions and cancelled the notices of determination and ordered a refund of $6,664.17, which was previously paid toward the tax asserted in the subject notices.

ARGUMENTS ON EXCEPTION

The Division argues that the Administrative Law Judge's conclusion that the waste removal services that Island Waste purchased were not taxable because the waste was not created at the transfer site has no support in the Tax Law. The Division notes that the Administrative Law Judge did not explain why the situs of where the waste is generated determines whether the hauling of waste constitutes a transportation service or why the removal of waste does not constitute a service or maintenance of petitioner's real property.

The Division states that the removal of waste from the Holtsville site kept that real property in a condition of fitness, efficiency, readiness or safety and, if it did not, it restored the real property to such condition. Thus, the Division asserts that petitioner's payments for the hauling of waste from its transfer facility were properly subject to sales tax.

In opposition, petitioner maintains that the Administrative Law Judge correctly determined that petitioner's payments were not subject to sales tax since the transportation services provided were not to maintain or service the transfer station, but rather, were part of and inherent to petitioner's governmentally regulated obligation as a waste transfer station. Moreover, petitioner states that the Administrative Law Judge properly concluded that the 2005 statutory amendment

was merely clarifying in nature, such that these payments were always intended to be exempt from sales tax.

In reply, the Division emphasizes that 20 NYCRR 527.7(b)(2) provides that "[a]ll services of trash or garbage removal are taxable." Thus, the 2005 amendment is a substantive change since the amendment expressly granted an exemption.

OPINION

The question presented here is whether the amounts paid by petitioner for the removal and transport of waste from its Long Island transfer station (hereinafter, "such payments" or "such charges"), represented taxable payments for "*maintaining, servicing or repairing real property*" under Tax Law § 1105(c)(5), which will be discussed in detail, infra.

Tax Law § 1105(c)(5), effective December 1, 2005 (which is after the period at issue), was amended by chapter 321 of the Laws of 2005 to explicitly exclude from the imposition of sales tax services of removal of waste from a regulated transfer station or construction and demolition debris processing facility, where the waste material to be removed was not generated by the facility. Consequently, for periods after December 1, 2005, there is no dispute that such charges are excluded from the sales tax.

However, petitioner argues that the 2005 amendment to the statute is irrelevant to the outcome here, since the amounts it paid for waste removal from the transfer station were only taxed because of the Division's misinterpretation of the statute. The Administrative Law Judge agreed with petitioner.

We reverse the determination of the Administrative Law Judge.

The Administrative Law Judge stated that a review of the amendment's legislative history (Governor's Bill Jacket, L 2005, ch 321) establishes that the Division's interpretation, as outlined

in the advisory opinion, was a "strained interpretation of the Tax Law that is beyond that contemplated by the Legislature when it sought to impose a tax on the services of maintaining real property."[9] This quoted excerpt is the only statement in the "legislative history" that the Administrative Law Judge relied on and derives from a portion of the sponsor's memorandum, in which the sponsor argues why he thinks that the bill is necessary. It represents only the argument of the sponsor. It is not contained in a Governor's Approval Message for the bill and, by itself, is inadequate to support the Administrative Law Judge's sweeping conclusion that "the [2005] amendment was a clarification and not a substantive change."

We note that the language of Tax Law § 1105(c)(5) before the 2005 amendment was very broad in its application[10] and included as taxable the:

> *Maintaining, servicing or repairing real property, property or land*, as such terms are defined in the real property tax law, 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 . . . [certain enumerated services]."

Until the 2005 amendments, the only exclusions enumerated were:

> (i) services rendered by an individual who is not in a regular trade or business offering his services to the public, (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting and, (iii) services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, . . ." (as amended by L 2000, ch 321).

Nowhere in the above exclusionary language, in effect prior to December 1, 2005, is there any reference to regulated transfer stations or government regulated entities. Not until

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[9] This language was included in the memorandum in support of sponsoring Assemblyman Morelle, as well as in the memorandum in support of Senator Spano.

[10] As it is today, except for the new subparapraph (iv) added by L 2005, ch 321.

enactment of the 2005 amendment (L 2005, ch 321) do we see such language added to the exclusions from tax as a new subparagraph (iv), which states:

> services of removal of waste material from a facility regulated as a transfer station or construction and demolition debris processing facility by the department of environmental conservation, provided that the waste material to be removed was not generated by the facility (Tax Law § 1105[c][5][iv]).

We find it difficult to reconcile the Administrative Law Judge's conclusion that this is a mere clarifying amendment in view of this language. We note that the Administrative Law Judge did not refer to other language in the bill sponsor's memorandum, which expressly stated that the "Purpose" of the bill was "To exclude from" the subject tax "services of removal of waste material from a waste transfer station," etc. The sponsor did not even suggest that the legislation would merely "clarify" the law. In any event, we note the Legislature does not enact sponsors' memoranda in support, but rather, it enacts legislation and we conclude that the 2005 amendment was substantive.

The Division's sales and use tax regulations (20 NYCRR 527.7[a]) provide, in part:

> (a) Definitions. (1) *Maintaining, 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, . . . trash and garbage removal . . . (emphasis added).

The Administrative Law Judge found that the Division's interpretation of the pre-2005 statute relied upon a forced and contorted reading of the relevant statutory language to hold that transportation charges paid to remove waste from a waste transfer facility for ultimate disposal at another facility represented the maintaining or servicing of real property. We disagree and conclude that the Division's interpretation of Tax Law § 1105(c)(5), in effect prior to December 1, 2005, was the only reasonable interpretation of the statute as it existed during the subject

period. Petitioner, in order to carry on its business, would in the ordinary course of its business interests, need to have old waste material removed in order to make room for the new. This would appear to us as maintaining and servicing of real property contemplated by the statute as then in effect.

The Administrative Law Judge stated that the total charge for picking up of waste from *homes and businesses that generate waste*, the waste's transportation and disposal at a landfill, is properly subject to sales tax as the integrated service of "maintaining" or "servicing" real property. We find this to be a misstatement of the law as it existed prior to the 2005 amendment as will be discussed. The Administrative Law Judge erroneously found that no taxable service existed in this case, because the waste was not generated by petitioner. As we have already noted, the statute, as it existed prior to December 1, 2005, made no reference to where or by whom waste was generated, and did not require as a condition to imposing tax that the waste material be generated by the owner or operator of the real property being serviced.

For the period prior to December 1, 2005, the total charge for pick up of waste material from real property, and its transportation and disposal at a landfill or burn center, have consistently been viewed as an integrated transaction with the total charge to the customer subject to tax (***see, Matter of Rochester Gas & Elec. Corp. v. State Tax Commn.***, 128 AD2d 238 [1987], ***affd*** 71 NY2d 931[1988]; ***Matter of Auburn Steel Co.***, Tax Appeals Tribunal, September 13, 1990). The statutory language at issue prior to December 1, 2005 supports the taxability of such integrated services, since they represent the "maintaining" or "servicing" of petitioner's real property.

The Administrative Law Judge, in concluding that petitioner was exempt from tax, found it significant that petitioner was a licensed, governmentally regulated entity. Although that is true,

being a licensed, governmental regulated entity does not automatically exempt petitioner from tax. For that, it took an amendment to the statute, which did not occur until 2005.

Having already found that the services provided to petitioner's real property were subject to tax under Tax Law § 1105(c)(5), we reject petitioner's argument that the hauling charges at issue constituted nontaxable transportation charges.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petitions of Island Waste Services, Ltd. and Island Waste Services, Ltd., f/k/a Selas Enterprises, Ltd., are denied; and

4. The Notice of Determination dated May 3, 2001 against Selas Enterprises Ltd., and the Notices of Determination dated August 12, 2004 and October 16, 2006 against Island Waste Services, Ltd., are sustained. Additionally, petitioner is to receive a credit in the amount of $6,664.17, as noted in footnote 5 of the findings of fact.

DATED: Troy, New York
April 16, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

APPENDIX

DTA #	Name of Petitioner	Period at Issue	Tax Asserted Due
821029	Parker, Dale L.	06/01/01-11/30/02	$ 437,775.65
821030	Persichilli, John	06/01/01-11/30/02	437,775.65
821031	Slager, Donald W.	06/01/01-11/30/02	437,775.65
821032	Stanas, Bruce D.	09/01/03-11/30/05	1,012,867.61
821033	Persichilli, John	03/01/98-11/30/99	410,510.52
821144	Boucher, Robert	06/01/01-02/28/02	237,871.84
821209	Allied Waste Systems, Inc.	12/01/00-11/30/03	Refund requested of $378,928.95
821210	Allied Waste Systems, Inc.	12/01/03-11/30/05	306,047.33
821211	RS Acquisition Co., LLC[12]	Period ended 11/30/05	306,047.33
821212	Parker, Dale L.	12/01/03-11/30/05	306,047.33
821453	White, Jo L.	09/01/03-11/30/05	1,012,867.61
821454	Stanas, Bruce D.	09/01/03-11/30/05	1,012,867.61
821526	Suburban Carting Corp.	06/01/03-11/30/05	439,240.05
821527	White, Jo L.	09/01/03-11/30/05	400,707.59
821528	Parker, Dale L.	09/01/03-11/30/05	400,707.59
821544	Martin, Thomas	09/01/03-11/30/05	400,707.59
821547	Parker, Dale L.	09/01/03-11/30/05	1,012,867.61

[12] Any liability of Allied Waste Systems, Inc. for the period of 12/01/03-11/30/05 was asserted due against RS Acquisition Co., LLC, as a bulk sale purchaser under Tax Law § 1141(c).