STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROLLINS ENVIRONMENTAL SERVICES (NJ), INC.		:
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 June 1, 1985 through May 31, 1988.	:	DETERMINATION DTA NOS. 808882 AND 808883
In the Matter of the Petition	:	
of	:	
ROLLINS ENVIRONMENTAL SERVICES (TX), INC.		:
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 June 1, 1985 through November 30, 1988.	:	

Petitioner Rollins Environmental Services (NJ), Inc., Attn: Donald Cerniglia, P.O. Box 337, Bridgeport, New Jersey 08014, filed a petition 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 June 1, 1985 through May 31, 1988.

Petitioner Rollins Environmental Services (TX), Inc., 2027 Battleground Road, Houston, Texas 77536, filed a petition 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 June 1, 1985 through November 30, 1988.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 6, 1992 at 9:15 A.M., with all briefs to be submitted by November 18, 1992. Petitioners, appearing byCooper, Erving, Savage, Nolan and Heller (Richard Weiner, Esq., and Madeline

Kibrick Kauffman, Esq., of counsel), filed a brief on July 21, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel), filed a responding brief on October 13, 1992. Petitioners filed a reply brief on November 18, 1992.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax on petitioners' waste removal and processing services.

II. Whether, if so, such imposition violates the Commerce Clause of the United States Constitution.

III. Whether petitioners have established any bases sufficient to warrant reduction or abatement of penalties.

FINDINGS OF FACT

On March 6, 1989, the Division of Taxation ("Division") issued to petitioner Rollins Environmental Services (NJ), Inc. ("Rollins [NJ]") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period June 1, 1985 through May 31, 1988 in the amount of $729,933.00, plus penalty and interest. On the same date, the Division also issued a second such notice assessing additional omnibus penalty (only) for the same period in the amount of $72,993.29.

On July 19, 1989, the Division issued to petitioner Rollins Environmental Services (TX), Inc. ("Rollins [TX]") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period June 1, 1985 through November 30, 1988 in the amount of $136,754.52, plus penalty and interest. On July 14, 1989, the Division also issued a second such notice assessing additional omnibus penalty (only) for the same period in the amount of $23,576.46.

Each of the above-described notices was issued upon the basis of an audit of the businesses conducted by Rollins (NJ) and Rollins (TX). Such entities offer nearly identical waste removal, treatment and disposal services, as more fully described hereinafter.

Rollins (NJ) is a foreign corporation with its principal and sole place of business in

Bridgeport, New Jersey. The Rollins (NJ) facility is a fully-permitted, hazardous waste treatment, storage and disposal facility. The Rollins (NJ) plant operates under hazardous waste management, air quality and surface water discharge permits issued by the State of New Jersey, as well as permits issued by the United States Department of Environmental Protection (the "EPA") under the Resource Conservation and Recovery Act ("RCRA"). During the audit period, Rollins (NJ) employed between 90 and 100 people to operate the facility and conduct its business.

Rollins (TX) is a foreign corporation with its principal and sole place of business in Deer Park (a Houston suburb), Texas. Like Rollins (NJ), Rollins (TX) is a fully-permitted, hazardous waste treatment, storage and disposal facility. The Rollins (TX) plant operates under permits issued by the State of Texas, and by the EPA under RCRA and the Toxic Substance Control Act ("TSCA"). The actual operations of the Rollins (TX) and Rollins (NJ) facilities are substantially similar. However, the Rollins (TX) plant is approximately three times larger than the Rollins (NJ) plant, and is one of only three high-temperature incinerators in the United States permitted to combust PCBs.[1] During the audit period, Rollins (TX) employed over 200 people to operate its facility and conduct its business.

During the audit period, wastes generated by various companies were transported to the Rollins (NJ) plant via customer delivery, common carrier or via one of four Rollins (NJ) trucks. In the case of Rollins (TX), such wastes were transported to the Rollins (TX) plant via customer delivery or common carrier. Rollins (TX) did not have any trucks during the audit period.

All wastes received at the Rollins (NJ) and Rollins (TX) facilities are sampled, and a "fingerprint" analysis is conducted to confirm the identification of each particular waste stream. The majority of the waste streams are tested for BTU heat content, tar content, and 14 to 15 different heavy metals. In addition, the waste streams are analyzed to ascertain the amount of

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[1]Rollins (NJ) is not authorized to combust PCBs.

acidity generated on combustion, and the residue which will remain following incineration. These analyses establish the compatibility of the wastes with other waste streams and with the Rollins' facilities' storage drums, tank farms, pipelines and pumps. The analyses also provide information regarding how to handle the specific wastes, and how and in what proportions to blend the wastes for efficient incineration.

Solid wastes are stored in barrels or drums (or in some instances bags), while liquid wastes are stored and blended in large (7,000 to 20,000 gallons) tanks maintained at the Rollins (NJ) and Rollins (TX) plants. After preparation for incineration, the solid wastes are placed on a motorized roller conveyor, which carries the wastes onto an elevator system for transport into a rotary kiln for incineration. After the liquid wastes are blended in preparation for incineration, they are pumped into an injector and atomized with air. In either case, following incineration, the combustion gases remaining from the liquid and solid wastes exit into an afterburner and are destroyed at temperatures of approximately 2500 degrees Fahrenheit, thereby effecting a complete burn.

In response to the notices of determination, requests for conciliation conferences were timely filed by Rollins (NJ) and Rollins (TX), and a consolidated conciliation conference was commenced on November 6, 1989.

On May 16, 1990, the conciliation conferee issued identical letters describing his understanding of the issues involved in these matters and proposing certain adjustments reducing the notices of determination. In each letter, the conferee stated:

> "In the instant matter[s], the waste is transported via one of three methods, common carrier, the customer itself, or by [petitioner's] own vehicle[s]. The audit division conceded that the treatment and disposal charges are exempt when delivered to the waste facility by common carrier and the customer itself. It is the charges for the transportation, treatment and disposal that are being held subject to tax when the waste is picked up by requester's (Rollins) own vehicles."

The conciliation conferee further indicated that petitioners would not be responsible for sales tax where Direct Payment Permits ("DP Permits") had been supplied to petitioners by the

customers.[2]

On July 18, 1990, following issuance of the above-described letters, the conference was reconvened for the purpose of discussing which particular invoices would be considered subject to sales tax.

On August 17, 1990, Conciliation Order No. 97645 was issued to Rollins (NJ) reducing the tax to $198,960.00, plus penalty and interest, and reducing the additional omnibus penalty to $19,896.00. On the same date,

Conciliation Order No. 99672 was issued to Rollins (TX) reducing the tax to $24,305.75, plus penalty and interest, and reducing the additional omnibus penalty to $2,430.57.

By a subsequent memorandum from the Division's auditor to the conferee, dated December 11, 1990, the tax claimed due from Rollins (NJ) was further reduced to $171,672.90, and the tax claimed due from Rollins (TX) was further reduced to $16,288.84. These reductions reflect adjustments made by the auditor to eliminate tax on those invoices which showed charges for treatment or disposal only (i.e., invoices reflecting customer delivery of wastes to petitioners, invoices reflecting out-of-state waste pick ups, and delivery of wastes to petitioners by common carrier with no transportation charge by petitioners indicated on the invoices).

The conferee provided a copy of the above-referenced memorandum to petitioners' representative, together with a letter, dated February 22, 1991, providing, in relevant part, as follows:

> "Pursuant to our telephone conversation this morning, I am enclosing copies of [the auditor's] memorandum and workpapers indicating additional adjustments subsequent to the July 18, 1990 conference.
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> * * *

[2]The conferee's letters issued to Rollins (NJ) and Rollins (TX) are substantively identical except for the dollar amounts of reductions in tax and penalties proposed in such letters for each of the individual petitioners.

"As stated previously, the enclosed adjustments and any future adjustments made prior to a hearing should be brought to the attention of the Administrative Law Judge" (emphasis added).[3]

The Division's audit involved a detailed examination of petitioners' invoices for the audit period. Such invoices describe, inter alia, petitioners' customers (by name and address), reflect a numeric code for the waste type being handled, and list on separate lines petitioners' charges for the services involved, including charges for weighing, treatment (based on the type of waste involved), and disposal. In some instances, transportation charges are reflected on the invoices, including additional charges where special types of transport and/or handling equipment was required (again based on the type of waste involved). The invoices include a space where the waste transporter is identified (usually by its initials). In those instances where transportation and/or special equipment charges appear on petitioners' invoices, such charge(s) included a profit (markup) in excess of the amount(s) charged by the common carrier(s) involved.

Neither Rollins (NJ) nor Rollins (TX) owns or leases any real property in New York State, or maintains sales offices, sales personnel or telephone numbers in New York State. Petitioners' services are advertised via trade shows, buyers' guides and some mass mailings. Petitioners' sales representatives sometimes make "wild card" or "cold" calls to manufacturers in New York State. All contracts are signed on petitioners' behalf at the New Jersey or Texas plant locations.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c) imposes a sales tax on receipts from sales, other than for resale, of certain enumerated services. The situs for the taxable event under section 1105(c) is found where the service is delivered (20 NYCRR 526.7[e][1]).

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[3] There is no evidence that any specific adjustments in addition to those set forth on the auditor's December 11, 1990 memorandum were made.

B. In this case, the relevant portions of Tax Law § 1105(c) are subdivisions (2) and (5) which provide, respectively, for tax on specified services, as follows:

> "(2) Producing, fabricating, processing, printing or imprinting 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.
>
> * * *
>
> "(5) 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 as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public . . . ."

C. As a preliminary matter, the parties disagree as to whether the dollar amounts at issue in this proceeding are the amounts specified on the August 17, 1990 conciliation orders, or rather the reduced amounts set forth on the auditor's December 11, 1990 memorandum. The Division seeks the former, noting that it is the conciliation orders from which appeal is taken, and claiming that the later adjustments should not reduce the conciliation order amounts but should be viewed as unaccepted proposals or reductions offered to settle the cases.

D. Generally speaking, where a conciliation conference is requested and held, the resulting conciliation order sets the dollar amount appealed from and at issue in subsequent proceedings before the Division of Tax Appeals (see, Tax Law § 170.3-a[e]). However, the evidence in this case clearly shows that the parties and the conferee intended and agreed that the additional reductions were to be allowed. First, the reductions are entirely consistent with the Division's specified basis for taxation in this case. As discussed more fully hereinafter, the Division seeks to impose tax on the entire invoice receipt if transportation charges are included, but has not imposed tax in those instances where the invoice was for processing and disposal only with no transportation charge included. Moreover, the tenor of the conferee's February 22, 1991 letter certainly supports a conclusion that such reductions were allowed by the Division, were accepted by the conferee, and were specifically anticipated to occur post-conference as part of ongoing evidence review. Most tellingly, the final sentence of the February 22, 1991

letters provides that such adjustments (i.e., those adjustments specified in the auditor's December 11, 1990 memorandum) as well as any "future adjustments" should be brought to the attention of the Administrative Law Judge (see Finding of Fact "14"). Thus, it is apparent that (a) the reductions specified in the auditor's December 11, 1990 memorandum were agreed to and must be allowed and (b) since there is no evidence of any other ("future") agreed-to adjustments, there is no basis to allow any further "conference agreed, pre-hearing" reductions. Accordingly, the amounts remaining at issue are $171,672.90 for Rollins (NJ) and $16,288.84 for Rollins (TX).[4]

E. As described, the tax remaining at issue is based on petitioners' entire receipts for waste transportation, treatment and disposal as shown on invoices which included transportation charges for a common carrier, or which reflected transportation by Rollins [NJ] trucks. The Division argues that such transportation amounts, even though separately stated, together with the balance of the processing and disposal charges, constitute charges

for an integrated waste removal service properly taxable as a service performed on New York real property. The Division maintains that the New York situs of the waste generator(s) allows taxing the entire receipt, notwithstanding that the treatment and disposal activities occur outside of New York. By contrast, petitioners argue that imposing the tax is improper as violating Commerce Clause standards, both because the services of treatment and disposal occur outside of New York and because petitioners' contacts with New York do not constitute sufficient nexus or connection with New York to allow taxation.

F. The issues presented herein have been addressed by the Tax Appeals Tribunal in

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[4]This conclusion does not comment on or "delve into" the methodology used in arriving at the conference reductions, nor does it substitute a different methodology therefor (Matter of Sandrich, Tax Appeals Tribunal, April 15, 1993, citing Matter of Commack Fish & Seafood Rest., Tax Appeals Tribunal, March 12, 1992). Rather, it simply recognizes that the evidence as a whole shows that the parties had, in fact, agreed to certain post-conference reductions and that the Division had specified the resulting dollar amounts remaining at issue.

Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992). General Electric had engaged a single vendor, Environmental Systems Company ("ENSCO"), to handle General Electric's PCB contaminated wastes. ENSCO sent its trucks into New York from Arkansas to pick up the hazardous waste and transport such waste back to Arkansas. ENSCO subsequently processed the waste by incineration in Arkansas and buried the postincineration ash and soot in a fully-permitted Arkansas landfill. The Division attempted to tax the entire cost charged by ENSCO to General Electric on the theory that all of the activities were part of an integrated trash removal service performed with respect to real property located in New York.

The Tribunal agreed that ENSCO's transportation, incineration and burial activities constituted an integrated waste removal service, citing Matter of Cecos Intl. v. State Tax Commn. (126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811). However, the Tribunal, determined that the Division's attempt to impose tax on the out-of-state processing and disposal aspects of such service violated the Commerce Clause of the United States Constitution. More specifically, the Tribunal applied the four criteria articulated by the United States Supreme Court in Complete Auto Transit v. Brady (430 US 274, 51 L Ed 2d 72 [1977]) which must be satisfied in order for a tax on interstate activities to withstand Commerce Clause scrutiny. Under Brady, a tax will withstand Commerce Clause scrutiny if: (1) the activity is sufficiently connected to the State to justify a tax (the "substantial nexus" requirement); (2) the tax is fairly related to benefits provided the taxpayer by the taxing jurisdiction; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly apportioned.

At issue in the General Electric case were the first and fourth criteria. The Tribunal held, as noted above, that the services performed by ENSCO (transportation and treatment and disposal) constituted an integrated waste removal service performed (at least partly) in New York, and that General Electric had a significant presence in the State. Therefore, the Tribunal concluded that a sufficient nexus existed with New York State to support the tax. However, the Tribunal determined that the tax as applied failed the fourth criteria under Brady inasmuch as the sales tax imposed on ENCSO's services was not fairly apportioned. In reaching this latter

conclusion, the Tribunal applied the two-prong analysis articulated in Goldberg v. Sweet (488 US 252, 102 L Ed 2d 607 [1989]) for determining fair apportionment. The first prong requires an analysis of whether the tax sought to be imposed is internally consistent, that is, the tax must be structured so that if an identical tax were to be imposed in another state, multiple taxation would not result. The second prong requires the tax to be externally consistent, that is, New York may tax only that portion of the revenues from the interstate activity which reasonably reflect the New York component of the activity being taxed. The Tribunal held that imposition of the sales tax in General Electric failed both the internal and external consistency tests, noting first that if an identical tax statute existed in Arkansas, such state could impose tax on the entire transportation, processing and disposal charges on the theory that the transportation was an integral part of the waste removal service. The Tribunal noted that, at the least, tax could be imposed on the waste treatment as processing of tangible personal property. This apparent risk of multiple taxation, coupled with the lack of any credit provision in the New York statute to avoid such a result, violates the internal test. Further, the Tribunal held that since there exists a practical way to apportion the New York tax to the New York component portion of the integrated service (e.g., New York miles travelled or the New York transportation portion of the entire charge), a tax on the entire invoice amount, without apportionment, fails the external test.

In this case, as in General Electric, invoices showing pickup and transport of wastes from New York locations caused the entire invoice charge (transport, processing and disposal) to be subjected to tax under Tax Law § 1105(c)(5) as an integrated waste removal service. Even though part of the transport, and all of the processing and disposal occurred outside of New York, no apportionment was made. Accordingly, based upon the reasoning and holding of the Tribunal in General Electric, the sales tax as applied to petitioners herein violates Commerce Clause (apportionment) standards.[5]

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[5]Given the foregoing it is unnecessary to address the substantial nexus prong of the Brady test. However, in General Electric, the Tribunal did find substantial nexus because General Electric contracted for an integrated waste removal service which was performed (at least partly) in New York and because General Electric had a significant presence in New York. Here, petitioners

G. Petitioners have argued in the alternative that the described services do not constitute an integratged waste removal service, but rather are separate and distinct services of transport and disposal (taxable [if performed in New York] under Tax Law § 1105[c][5]), and processing (taxable [if performed in New York] under Tax Law § 1105[c][2]). Petitioners maintain that while transport and disposal may together be treated as an integrated waste removal service, processing may not be included therein (citing Cecos, supra). This alternative argument merits brief discussion.

Petitioners admit their argument runs counter to the Tribunal's analysis in General Electric. In fact, the Tribunal specifically addressed such an argument in its General Electric decision. In this regard, the Tribunal observed as follows:

> "Petitioner's assertion herein that processing of waste is not an integral part of the service of trash removal is apparently based on the [Cecos] court's conclusion that the processing of waste is a taxable transaction under section 1105(c)(2) (Matter of Cecos Intl. v. State Tax Commn., supra, at 937). Petitioner fails to place that discussion in the context of the facts in Cecos, namely, that the petitioner had transactions where it charged customers only for the processing of waste brought to its facilities by the customers and asserted that such charges were not taxable. In this context, the court held such charges taxable as processing under section 1105(c)(2)." (Id.; emphasis added.)

Simply stated, the fact that processing charges alone may be taxed under Tax Law § 1105(c)(2) does not require a conclusion that such charges cannot be included and taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service when such overall service, as opposed to simply processing by a landfill operator, is being offered. In this regard processing, which occurs between transport and disposal, could reasonably be called the "middle step" in an integrated waste removal service taxable as an integral part thereof under Tax Law § 1105(c)(5). To place petitioners' argument in full context, "tipping" or disposal fees alone are not taxable (at

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provided an integrated waste removal service as described, apparently maintained ongoing relationships with New York customers, solicited business to some extent directly in New York and, in the case of Rollins (NJ), regularly sent vehicles into New York and travelled over its roadways. Hence, petitioners would face a difficult hurdle in establishing a lack of nexus with New York (see, Quill Corp. v. North Dakota, ___ US ___, 119 L Ed 2d 9).

an in-state landfill), yet when coupled with pickup and transport become a taxable part of an integrated waste removal service (Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). Unlike tipping fees, processing of waste is taxable under Tax Law § 1105(c)(2), yet when processing is included together with pickup, transport and disposal, the same constitutes an integrated trash removal service the entire fee for which is taxable under Tax Law § 1105(c)(5) (Matter of Cecos Intl. v. State Tax Commn., supra). It does not follow that because processing, when offered alone, may be taxed under Tax Law § 1105(c)(2), it must be segregated out and taxed alone under such section in all instances and is precluded from being taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service. Such a conclusion would be inconsistent with the combined holdings of Penfold, Cecos and General Electric.

H. In light of the foregoing conclusions, Issue III is rendered moot.

I. The petitions of Rollins Environmental Services (NJ), Inc. and Rollins Environmental Services (TX), Inc. are granted, and the notices of determination dated March 6, 1989, July 14, 1989 and July 19, 1989, respectively, are cancelled.

DATED: Troy, New York
May 13, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE