STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SENECA FOODS CORP.	:	DETERMINATION DTA NO. 809054
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, 1984 through August 31, 1987.	:	

Petitioner, Seneca Foods Corp., 1162 Pittsford-Victor Road, Pittsford, New York 14534, 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, 1984 through August 31, 1987.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 9, 1993 at 1:15 P.M., with all briefs to be submitted by December 22, 1993. Petitioner appeared by Boylan, Brown, Code, Fowler & Wilson (Howard Konar, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether payments made by petitioner for the removal of its food by-products and food by-product sludge constitute payments made for trash or garbage removal and therefore subject to tax pursuant to Tax Law § 1105(c)(5) and 20 NYCRR 527.7(a)(1).

FINDINGS OF FACT

The parties entered into a Stipulation of Facts pursuant to 20 NYCRR 3000.7 which has been incorporated into the following Findings of Fact. In addition, petitioner, Seneca Foods Corp. ("Seneca"), submitted 10 proposed findings of fact pursuant to 20 NYCRR 3000.10(d)(5) and State Administrative Procedure Act § 307.1. These findings also are incorporated into the following Findings of Fact, except where they referred to facts not in the record or stated legal arguments.

At all times relevant herein, petitioner was a New York corporation incorporated in 1949.

During the period June 1, 1984 through August 31, 1987 (the "period in issue"), petitioner was engaged in three principal lines of business: food processing, textile converting and air chartering. At present, petitioner continues to be engaged in these three principal lines of business.

During the period in issue, food processing contributed approximately 85% of petitioner's net sales. At present, food processing continues to contribute approximately 85% of petitioner's net sales.

During the period in issue, the principal products of petitioner's food processing business were a variety of apple products. During the period in issue, petitioner's Seneca brand frozen apple concentrate was the nation's number one selling frozen apple concentrate. At present, this brand continues to be the nation's number one selling frozen apple concentrate.

During the period in issue, in addition to apple products, petitioner's food processing business also produced canned and frozen vegetables and other fruit products.

During the years 1988 and 1989, petitioner was the subject of an audit (the "audit") conducted by Martin I. Dater (the "auditor") of the Division of Taxation ("Division") - Sales Tax.

For purposes of the audit, petitioner elected utilization of a "representative test period" audit method to determine any sales and use tax liability.

On April 19, 1989, the auditor issued to petitioner a Statement of Proposed Audit Adjustment (the "Statement of Adjustment"). The Statement of Adjustment showed a tax due of $30,465.69 and stated this amount represented "only the agreed portion of the total additional tax due." This amount covered sales taxes with respect to utility and other charges -- items which are not presently in dispute.

On April 25, 1989, petitioner consented to the Statement of Adjustment. On or about April 25, 1989, petitioner paid $40,010.00 to the Division. This payment represented the

$30,465.69 of agreed tax liability on the Statement of Adjustment, plus $9,544.31 of interest.

On June 6, 1989, the Division issued to petitioner three notices of determination and demands for payment of sales and use taxes due.

Notice Number S890501001R showed total tax due of $82,669.90, total penalty due of $23,020.35 and total interest due of $45,530.88, for a total amount due of $151,221.13. This notice stated that petitioner's "payment of $40,010.00 will be applied to this assessment."

Notice Number S890606000R showed total tax due of $45,412.15 and total interest due of $13,322.61, for a total amount due of $58,734.76.

Notice Number S890606001R showed no total tax due, but showed total penalty due of $4,503.00.

The sum of the total amount due shown on all three notices was $214,458.89. Of this amount, $128,082.05 was total tax due (hereinafter, "Aggregate Tax Due Per Notices"), $27,523.35 was total penalty due and $58,853.49 was total interest due. The following chart summarizes the notices:

	Total Tax Due	Total Penalty Due	Total Interest Due	Total Amount Due
Notice S890501001R	$ 82,669.90	$23,020.35	$45,530.88	$151,221.13
Notice S890606000R	45,412.15	.00	13,322.61	58,734.76
Notice S890606001R	.00	4,503.00	.00	4,503.00
Total	$128,082.05	$27,523.35	$58,853.49	$214,458.89

Because the Aggregate Tax Due Per Notices ($128,082.05) included the $30,465.69 of tax paid by petitioner upon receipt of the Statement of Adjustment, the actual amount of tax in dispute at the time the notices were issued was $97,616.36 ($128,082.05 - $30,465.69) (the "Initial Disputed Tax").

On September 5, 1989, petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services. On June 10, 1990,[1] a conciliation conference was held in Rochester, New York. On October 5, 1990, Conciliation Conferee Wayne Clark issued his

[1]The actual date of the conference according to the Conciliation Order was January 10, 1990.

Conciliation Order.

Pursuant to the Conciliation Order, the conciliation conferee: (i) cancelled the total penalty due with respect to Notice Number S890501001R ($23,020.35) and the total penalty due with respect to Notice Number S890606001R ($4,503.00); but (ii) upheld the total tax due with respect to Notice Number S890501001R ($82,669.90) and total tax due with respect to Notice Number S890606000R ($45,412.15).

On December 31, 1990, petitioner filed with the Division of Tax Appeals a Petition for Redetermination of a Deficiency and for Refund (the "Petition").

On February 19, 1991, the Division filed its answer to the Petition.

The Initial Disputed Tax ($97,616.36) can be divided into two distinct categories: (i) sales taxes purportedly owed with respect to industrial development authority properties (hereinafter, the "IDA Tax Issue"); and (ii) sales taxes purportedly owed with respect to items on the test-period invoice list generated by the auditor (the "Invoice List") (hereinafter, the "Open Tax Issue"). Of the Initial Disputed Tax, the IDA Tax Issue represented $45,412.15 and the Open Tax Issue represented $52,204.21. Petitioner's payment of $30,465.69 of agreed tax liability, plus the Initial Disputed Tax of $52,204.21 on the Open Tax Issue, equals the total tax due of $82,669.90 on Notice Number S890501001R.

Subsequent to the date the Petition was filed, petitioner and the Division settled their disagreement with respect to the entire IDA Tax Issue. In the settlement, petitioner agreed to pay $34,402.03 of the $45,412.15, plus applicable interest.

The sales tax purportedly owed with respect to the Open Tax Issue was calculated as follows: (i) the auditor reviewed petitioner's expenses on the Invoice List; (ii) the auditor calculated the total "taxable amount" for such invoices to be $51,514.37; and (iii) the auditor extrapolated from this test period "taxable amount" and calculated that petitioner's additional tax due was $52,204.21 (see, auditor's worksheet).

Subsequent to the date the Petition was filed, petitioner conceded its sales tax liability

with respect to part of the Open Tax Issue. Petitioner conceded that the amounts paid to G.V.G. Sanitation Co. and Ed Scott Disposal were subject to sales tax. The total of these amounts, which appear as Item Nos. 134, 135, 237 and 247 on the Invoice List, is $11,502.35. By extrapolation, petitioner conceded that it was liable for $11,656.38 of the $52,204.21 Open Tax Issue, plus applicable interest. This liability was calculated as follows:

$$\frac{\$11,502.35}{\$51,514.37} \times \$52,204.21 = \$11,656.38$$

Subsequent to the date the Petition was filed, the Division conceded that petitioner was not liable with respect to part of the Open Tax Issue. The Division conceded that the amounts paid to Lee Vanderzille, Inc., Ernest Phillips and Stephen Smith Farms were not subject to sales tax. The total of these amounts, which appear as Item Nos. 209, 342 and 347 on the Invoice List, is $3,890.32. By extrapolation, the Division conceded that petitioner was not liable for $3,942.42 of the Open Tax Issue. This liability was calculated as follows:

$$\$\frac{3,890.32}{\$51,514.37} \times \$52,204.21 = \$3,942.42$$

The total amount of purported sales tax remaining in dispute is $36,605.41 ($52,204.21 - $11,656.38 - $3,942.42) (the "Remaining Disputed Amount"). A summary of the history of taxes and penalties with respect to each notice is set forth below:

Notice S890501001R

Total Tax Due per Notice	$82,669.90
Total Penalty Due per Notice	23,020.35
Penalty Cancelled by Conciliation Conferee	(23,020.35)
Payment Made by Petitioner	(30,465.69)
Amount Conceded by Petitioner	(11,656.38)
Amount Conceded by Division	(3,942.42)
Remaining Disputed Amount	$36,605.41

Notice S890606000R

Total Tax Due per Notice	$45,412.15
Amount Conceded by Petitioner	(34,402.03)
Amount Conceded by Division	(11,010.12)
Remaining Disputed Amount	$ 0.00

Notice S890606001R

Total Penalty Due per Notice	$ 4,503.00
Penalty Cancelled by Conciliation Conferee	(4,503.00)
Remaining Disputed Amount	$ 0.00

The Remaining Disputed Amount relates solely to whether petitioner is liable for New York State sales tax with respect to payments on the Invoice List, other than payments with respect to items conceded by petitioner (i.e., the payments to G.V.G. Sanitation Co. and Ed Scott Disposal), and items conceded by the Division (i.e., the payments to Lee Vanderzille, Inc., Ernest Phillips and Stephen Smith Farms).

All of the disputed payments on the Invoice List relate to the disposition of food by-products from petitioner's food processing facilities. The Division's contention is that these food by-products are trash or garbage, and that payments made to pick up, transport and dispose of these food by-products constitute payments for trash or garbage removal, which are subject to sales tax pursuant to Tax Law § 1105(c)(5) and 20 NYCRR 527.7(a)(1). Petitioner contends that the food by-products are used as animal feed and fertilizer, and that payments made to transport the food by-products do not constitute payments for trash or garbage removal.

During the period at issue, G.V.G. Sanitation Co. and Ed Scott Disposal operated trash and garbage disposal services.

During the period at issue, G.V.G. Sanitation Co. and Ed Scott Disposal hauled trash and garbage from petitioner's food processing facilities. This trash and garbage was dumped in various landfills. The typical charge made for this trash and garbage removal service, as evidenced by invoices on the Invoice List, was $260.00 per load (see, Exhibit "H"), which equaled approximately $37.91 per ton of trash and garbage.

During the period at issue, Leo Dickson & Sons, Inc. and Schreiber Bros. Farms operated working farms.

Of the amounts on the Invoice List, $29,078.50 represent payments to Schreiber Bros Farms (which payments extrapolate to $29,467.89 of the Remaining Disputed Amount). During the period at issue, Schreiber Bros. Farms removed apple pomace, corn husks and green bean by-products from petitioner's food processing plant in Marion, New York, to the farm Schreiber Bros. Farms operated in Ontario, New York. The typical charge made for removing these food by-products, as evidenced by invoices on the Invoice List, was $10.00 per ton (see, Exhibit "I"). At the farm operated by Schreiber Bros. Farms, these apple pomace, corn husks and green bean by-products were fed to and eaten by cows, along with corn silage and hay. During the period at issue, Schreiber Bros. Farms fattened cattle for slaughter.

Of the amounts on the Invoice List, $7,043.20 represents payments to Leo Dickson & Sons, Inc. (which payments extrapolate to $7,137.52 of the Remaining Disputed Amount). During the period at issue, Leo Dickson & Sons, Inc. removed "food by-product sludge" from petitioner's food processing plant in Dundee, New York, to the farm Leo Dickson & Sons, Inc. operated in Bath, New York. The typical charge made for removing this food by-product sludge, as evidenced by invoices on the Invoice list, was 4.93 cents per gallon, which equalled approximately $11.59 per ton. At the farm operated by Leo Dickson & Sons, Inc., this food by-product sludge was applied to cornfields as a fertilizer. During the period at issue, Leo Dickson & Sons, Inc. grew corn to feed its dairy cattle.

The items on the Invoice List were recorded in petitioner's "Chart of Accounts" under the heading "Waste Handling".

During the period at issue, petitioner did not maintain storage facilities for food by-products.

Affidavits of James R. Schreiber, general partner of Schreiber Bros. Farms, and Philip M. Dickson, president of Leo Dickson & Sons, Inc., were introduced by petitioner to show, in each case: (i) that petitioner's food by-products replaced the animal feed or fertilizer, as the case may be, that the farm would have purchased from another source; and (ii) that Dickson invested $165,000.00 in farm equipment specifically purchased to inject food

processing sludge into its cornfields.

Schreiber is engaged in the feeder cattle business. This business involves purchasing a cow when it weighs approximately 500 pounds, then fattening up the cow to a weight of approximately 1,300 pounds, at which point the cow is sold for slaughter. At the farm operated by Schreiber, all of the apple pomace, corn husks and green bean by-products were fed to cows. Dickson is engaged in the dairy cattle business and grows corn to feed to its dairy cattle. At the farm operated by Dickson, all of the food processing sludge was applied to cornfields as fertilizer.

At the hearing, evidence in the form of letters from professors of animal nutrition and soil science at Cornell University was introduced by petitioner to show: (i) that apple pomace has value as an animal feed and has been approved as a feed ingredient by New York State; and (ii) that the food processing sludge contains sufficient plant nutrients to grow a normal crop of corn in western New York. Additional evidence in the form of a letter from Deputy Commissioner Dennis Rapp, Natural Resources and Environmental Programs, New York State Department of Agriculture and Markets, was introduced by petitioner to show that the Department of Agriculture and Markets considers food processing by-products to be useful and beneficial when used as a soil amendment or livestock feed.

Items such as paper and plastic wrap, conceded by petitioner to be trash or garbage, were hauled by G.V.G. Sanitation Co. ("G.V.G.") and Ed Scott Disposal from petitioner's food processing facilities to various landfills, where they were dumped (see, Finding of Fact "29").

Petitioner made a payment of approximately $10.00 per ton to Schreiber in connection with the transportation of the apple pomace, corn husks and green bean by-products. Petitioner made a payment of approximately $11.59 per ton to Dickson in connection with the transportation of the food processing sludge. Petitioner made a payment of approximately $37.91 per ton to G.V.G. in connection with the hauling and disposal of trash and garbage (see, Finding of Fact "29").

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(5) imposes a tax on the receipts from every sale, except for resale, of the service of "[m]aintaining, servicing or repairing real property . . . ."

20 NYCRR 527.7(a)(1) provides:

> "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, tree removal and spraying, trash and garbage removal and sewerage service and snow removal." (Emphasis added.)

B. The Division correctly noted that the removal of valueless industrial waste is a trash removal service. The difficulty in this matter is the determination of whether the food by-products and food by-product sludge are valuable commodities with inherent worth but whose transportation cost exceeds said value.

The Division has taken a position contrary to its own policy set forth in Matter of Diaz Chemical (State Tax Commn., November 20, 1986) wherein it was decided that the removal of wet sulfuric acid from Diaz Chemical's facility to consumers rather than waste sites constituted a transportation service and not the maintenance and service to that petitioner's property within the meaning and intent of Tax Law § 1105(c)(5). Of particular note in the Diaz case was the Commission's determination that it was of no consequence that Diaz paid more to transport the wet sulfuric acid than the sales price for the product. The Commission specifically found that the higher costs of transportation did not transform the transportation service into a waste removal service.

This forum is well aware of the Tribunal's pronouncement on the status of State Tax Commission decisions:

> "As decisions of a body of coordinate jurisdiction, the State Tax Commission decisions are not binding precedent for us, but are entitled to respectful consideration [citing Matter of Cruikshank's Estate, 169 Misc 514, 8 NYS2d 279]" (Matter of Racal Corporation and Decca Electronics, Inc., Tax Appeals Tribunal, May 13, 1993).

It is determined that the Diaz case is one worthy of both respect and consideration. It is directly on point, possesses logical rationale and sets forth existing audit policy as of 1986 on the subject in issue. However, assuming a reluctance to accept this rationale, the result in Diaz

has independent support.

C. Value is a critical element in the analysis. The food by-product and by-product sludge had value, and had value from an objective viewpoint, i.e., the by-product had a value recognized by experts in the field and was utilized as a valuable product consistent with those expert opinions. The letter from Cornell University's College of Agriculture and Life Sciences stated that product such as the apple pomace and corn silage purchased by Schreiber Bros. had value as an animal feed and a feed ingredient. The affidavits of James R. Schreiber and Phillip M. Dickson, both operators of farms, explained that the by-product replaced corn and hay as feed, and the sludge replaced nitrogen, phosphorous and potash as fertilizer. They used their own trucks to pick up and deliver the food by-product and sludge and did it for considerably less than refuse haulers like G.V.G. charged for trash.

Petitioner used G.V.G. Sanitation Co. to remove trash during the period in issue. The average cost for removal of trash was $37.91 per ton. During the same period, Schreiber and Dickson charged petitioner only $10.00 and $11.59 per ton, respectively. Both farms said their charges represented the difference between their expense in picking up and transporting the by-product and sludge and the value of the by-product and sludge. That the sludge was of value to the Dickson farm was further attested to by Dickson's investment in a $165,000.00 "Terragator", which was used solely to inject the sludge into cornfields.

Additional support for the value of the by-products was contributed by Mr. Dennis Rapp, Deputy Commissioner, Department of Agriculture and Markets, who characterized the by-products as "useful" and "beneficial" agents which improve soil structure and provide nutrients for plant production as well as having a nutrient value as livestock feed. Mr. Rapp said the Department of Agriculture and Markets would not consider such food processing residues as garbage when used for these purposes.

D. This case can be distinguished from Matter of Rochester Gas and Electric Corp. v. New York State Tax Commn. (128 AD2d 238, 516 NYS2d 341, affd 71 NY2d 931, 528 NYS2d 810) and Matter of Auburn Steel Co. (Tax Appeals Tribunal, September 13, 1990) and

gain support from the rationale therein.

In Rochester Gas and Electric Corp., the company sought to categorize the removal of fly ash, a by-product of the combustion of coal, as a transportation service, not a trash removal service. The Appellate Division said that the service was not the transportation of a useful product from one location to another, but the removal of a waste product (Matter of Rochester Gas and Electric Corp. v. New York State Tax Commn., supra, 516 NYS2d at 343). The Court of Appeals, in affirming, went even further in regard to the value of the fly ash, stating:

> "Fly ash is concededly a waste product, with little or no economic value and is hauled to landfills by carriers retained by petitioner" (Matter of Rochester Gas and Electric Corp. v. New York State Tax Commn., supra, 528 NYS2d at 811).

In conclusion, the Court of Appeals held that the collection, hauling and disposal of the fly ash was an integrated service taxable under Tax Law § 1105(c)(5), not the transportation of a useful product from one location to another.

Similarly, in Auburn Steel, the charges for the transportation of particulate dust, an industrial by-product, were found to be trash removal services and not "transportation charges for transporting a useful product from one location to another" (Matter of Auburn Steel Co., supra). In both the Rochester Gas and Electric and Auburn Steel cases, the by-product was rarely sold and had minimal economic value.

The evidence in the instant record indicated an objective economic value of the food by-product and sludge that was a useful product to the Schreiber and Dickson farms, both of whom chose to use the products in place of more expensive products on the market. These farms undertook to transport this useful product "from one location to another" (from Seneca's production facility to their farms) and not to provide a trash removal service.

It may be that these transactions were not properly categorized and recorded in petitioner's chart of accounts, but such a mischaracterization must not be held to exalt form over substance in light of the all the evidence adduced herein (Burger King v. State Tax Commn., 95 Misc 2d 442, 407 NYS2d, mod 70 AD2d 447, 421 NYS2d 668, mod 51 NY2d 614, 435 NYS2d 689).

Although petitioner ultimately paid the excess of the transportation charges over the value of the products in the transactions with Schreiber and Dickson, it does not change the true nature or actual circumstances of those services. As the Commission said in Diaz, the fact that the transportation charges exceeded the value of the product does not transform the transportation service into a waste removal service.

E. The petition of Seneca Foods Corp. is granted to the extent of the amount remaining in issue as set forth in Finding of Fact "25"; the three notices of determination and demands for payment of sales and use taxes due, dated June 6, 1989, as modified at conference (see, Finding of Fact "17") and by agreement between the parties (Findings of Fact "20" through "25"), are in all other respects sustained.

DATED: Troy, New York
June 9, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE