STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **GENERAL MOTORS CORPORATION** for Redetermination of a Deficiency or for Refund of Special Assessments on the Generation of Hazardous Waste under Article 27 of the Environmental Conservation Law for the Period April 1, 1997 through June 30, 1998.	:	DETERMINATION DTA NOS. 818260 AND 818586
In the Matter of the Petition of **AMERICAN AXLE & MANUFACTURING, INC.** for Redetermination of a Deficiency or for Refund of Special Assessments on the Generation of Hazardous Waste under Article 27 of the Environmental Conservation Law for the Period July 1, 1998 through March 31, 1999.	:	

Petitioners, General Motors Corporation, 2995 River Road, Buffalo, New York 14207, and American Axle & Manufacturing, Inc., P.O. Box 1210, Buffalo, New York 14240, filed petitions for redetermination of deficiencies or for refund of the special assessment on generation of hazardous waste under Article 27 of the Environmental Conservation Law. The period at issue for General Motors Corporation is April 1, 1997 through June 30, 1998 and the period at issue for American Axle & Manufacturing, Inc. is July 1, 1998 through March 31, 1999.

A hearing was held before Gary R. Palmer, Administrative Law Judge, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York, on March 1, 2002 and

continued to conclusion at the offices of the Division of Tax Appeals, 77 Broadway, Suite 112, Buffalo, New York on April 9, 2002. All briefs were to be submitted by August 30, 2002, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Bond, Schoeneck and King, Esqs., (Robert S. McLaughlin, Esq., Kathleen M. Bennett, Esq., and Thomas R. Smith, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq., (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether petitioners are entitled to claim the statutory exclusion from imposition of the special assessment on generation of hazardous waste set forth in Environmental Conservation Law § 27-0923(3)(c).

FINDINGS OF FACT

1. Petitioner General Motors Corporation ("GMC") is the owner or former owner of a manufacturing facility located in the City of Tonawanda, County of Erie, which was known as the General Motors Powertrain Facility, and which is hereinafter referred to as "the facility."

2. The facility formerly consisted of two engine/powertrain manufacturing plants, a foundry complex with a dedicated wastewater treatment plant, a forge, a power plant, other related structures, railroad sidings and employee parking areas. The wastewater treatment plant consisted of five settling tanks and three clarifier tanks. Original construction of the facility began in 1952. The foundry was used to cast iron into engine blocks using molds made of sand into which molten metal was poured to form the engine blocks. The foundry complex included eight ovens with hydraulically operated doors in which the casting took place.

3. Until the mid 1970s, the hydraulic fluid used to operate the oven doors and related equipment in the foundry contained polychlorinated biphenyls ("PCBs"). The sand used to form the engine block molds would accumulate in the basement of the foundry after use where it became contaminated with the PCB based hydraulic fluid. A separate source of PCB contamination in the foundry was the electrical transformers. PCB based oils were widely used at the time in hydraulic and electrical equipment because of their fire retardant properties. Because of their detrimental effect on human health and the environment, the United States Environmental Protection Agency ("EPA") began regulating the disposal of PCBs in 1978, and by 1979 the EPA began restricting the manufacture, distribution and use of PCBs throughout the United States. In 1982 the New York State Department of Environmental Conservation ("DEC") began regulating PCBs in concentrations of or greater than 50 parts per million ("ppm") as hazardous waste.

4. In 1984 GMC shut down the foundry with the intention that it would one day be decommissioned and demolished. Between 1984 and 1987 most of the mechanical equipment was removed from the foundry, and it was fenced off from the rest of the facility. The PCB contaminated sand remained in the basement and in the settling tanks and clarifiers that were part of the foundry operation. By 1996 the foundry complex was badly deteriorated with water in the basement and vegetation growing in the wastewater treatment plant. In 1996 GMC was awarded a new contract that required the expansion of the engine plant adjoining the idled foundry structure. In anticipation of the demolition of the foundry and the construction of an addition to the engine plant on the foundry site, an environmental survey was conducted by GMC which discovered the presence of lead and concentrations of PCBs greater than 50 ppm.

GMC had to remediate the contamination on the site before it could complete the demolition of the foundry and build the addition to the engine plant. Because the regulations of the DEC and the EPA defined concentrations of PCBs of or greater than 50 ppm as hazardous waste, strict protocols regarding the segregation and handling of contaminated materials were adhered to. An exclusion zone was established on the foundry site where only trained workers wearing respirators and personal protective equipment required by the Occupational Safety and Health Association ("OSHA") were permitted to work. The area of contamination concept ("AOC") was determined to be applicable to the foundry complex whereby, during cleanup, hazardous waste was temporarily relocated within the AOC before permanent removal from the site without a permit from the DEC. The AOC concept was developed by the EPA for use in remediation projects. GMC caused all contaminated sand, including that with less than 50 ppm of PCBs, to be treated as hazardous waste which was loaded on to railroad cars for transport to a Federally licensed hazardous waste disposal site in Utah. The cost of the remediation plan conducted by GMC at the foundry and American Axle & Manufacturing sites constituted a qualified environmental remediation expenditure within the contemplation of the Internal Revenue Code.

On September 13, 1996 Mr. Wager, an environmental engineer from the DEC Division of Water, visited the foundry site and asked questions regarding storm water infiltration and runoff, and the chemical analysis of certain samples. Mr. Wager's concerns were addressed in a GMC letter dated September 27, 1996. A letter from the EPA PCB program coordinator to a GMC employee dated November 8, 1996 addressed procedures to be followed in remediating PCB contaminated concrete and steel. Another letter from the PCB program coordinator to GMC dated July 3, 1997 approved the PCB remediation by GMC as consistent with Federal PCB

regulations and advised that GMC could proceed to fill the foundry basement with flowable fill. A letter from a DEC regional solid materials engineer dated July 2, 1997 to GMC advised that it was acceptable to use concrete debris from the site that tested less than one ppm of PCBs as backfill material for the basement. This letter also cautioned GMC to comply with all applicable local, State and Federal rules and regulations. The demolition of the foundry structure was completed in late 1997 and the basement was filled with flowable fill consisting of cement, sand and gravel.

5. The forge plant was where cam shafts and other engine components were forged from bar steel. In February 1994 the forge plant was sold by GMC to American Axle & Manufacturing, Inc. ("AAM") pursuant to an agreement whereby GMC assumed responsibility for the cleanup of soil, groundwater or subsurface PCB or other hazardous waste contamination in and around the forge plant site.

6. In furtherance of its responsibilities to AAM, GMC conducted a subsurface soil investigation consisting of 22 borings and the drilling of a monitoring well. The investigation disclosed high levels of PCBs in the soil at an area previously used by GMC as a scale and sludge storage area where PCB contaminated metal shavings had been stored on the ground. On June 26, 1998 a soil removal plan was submitted to Robert Smythe, an environmental engineer with the DEC Division of Water, by Blasland, Bouck and Lee ("BBL"), environmental consultants to GMC. The soil removal plan submitted followed standards set forth in a DEC technical and administrative guidance memorandum known as TAGM 4046, which applied to PCB remediation wastes. Neither Mr. Smythe nor anyone else at DEC objected to the plan which GMC implemented beginning July 2, 1998. An interim soil removal report was submitted

to Mr. Smythe on August 26, 1998 which advised of the presence of PCBs in the storm water drainage system at the AAM site. The sediments in this system were removed by a vacuum truck. The system was then pressure washed with the contaminated material being collected by the vacuum truck.

7. GMC shipped the following quantities of PCB contaminated hazardous waste collected from the foundry complex for disposition in the Federally licensed landfill in Utah, with special assessments on hazardous wastes generated being assessed by the Division of Taxation ("Division") in the following amounts:

notice no.	quarter ending	tons of PCB waste	special assessment
H981224002W	June 30, 1997	1,246.7	$33,659.10
H981224003W	Sept. 30, 1997	339.5	$ 8,763.10
H990121001W	Dec. 31, 1997	17.6	$ 475.20
Totals		1,603.8	$42,897.40

8. GMC shipped the following quantities of lead contaminated hazardous waste for disposal at the landfill in Utah with the following amounts imposed as special assessments on hazardous waste generated:

notice no.	quarter ending	tons/lead waste	special assessment
H990420028W	March. 31, 1998	59.1	$1,610.10
H990811026W	June 30 1998	1,404.1	$37,929.90
Totals		1,463.2	$39,540.00

9. The statutory exclusion for hazardous waste generated was claimed by petitioners on each of their filed quarterly returns of special assessments on generation, treatment or disposal of

hazardous waste, form TP-550. The basis of the claimed exclusion was stated in detail on a document entitled "Addendum to Form TP-550," a copy of which was attached to each form TP-550 filed.

10. Because GMC had no scale at the foundry complex or the AAM forge site with which to weigh the hazardous waste being shipped, it entered an estimated weight on the manifest documents given the shipper that, in each instance, exceeded the actual weight of the hazardous waste shipped to the landfill. This overstatement of the weight of the hazardous waste shipped on the manifests resulted in an overstatement by GMC of the weight of hazardous waste shipped as reported on its quarterly TP-550 returns, which resulted in an overstatement of the amount of the special assessment stated on each notice of deficiency issued by the Division to GMC and AAM.

11. Upon receipt of the hazardous waste at the landfill in Utah, the disposal facility operator weighed the hazardous waste and entered its actual weight on the manifest documents delivered to it, which were then sent to DEC and GMC or AAM. Based on this corrected weight information, the Division issued discrepancy statements of audit adjustment to GMC or AAM that corresponded with each notice of deficiency issued, reducing the amounts of the special assessment imposed in accordance with the corrected weights of hazardous waste reported.

12. On March 17, 2000 three notices of deficiency were issued to AAM imposing special assessments in the following amounts, plus penalty and interest.

notice no.	quarter ending	tons/PCB waste	special assessment
H991209002W	September 30, 1998	5,137.5	$138,712.50
H991224001W	December 31, 1998	1,031.7	$27,846.90
H000211017W	March 31, 1999	464.0	$16,266.60
Totals		6,633.2	$182,826.00

One of these notices, notice no. H000211017W for the first quarter of 1999, was issued for a quarter for which no return on special assessments, form TP-550, was filed. This special assessment was based on available information provided by DEC to the Division. The notice imposed the special assessment plus a 25 percent penalty for failure to file the return, plus interest. AAM did not file a form TP-550 for the first quarter of 1999 because, according to AAM, absent the PCB wastes generated, no special assessment was due.

13. GMC was issued a State Pollutant Discharge Elimination System (SPDES) Discharge Permit for its Tonawanda engine plant sites, including the AAM site, which permit regulated waste water discharges from four outfalls into the Niagara River under the ongoing supervision of the DEC Division of Water. No other permits issued by the EPA or the DEC for the disposal of hazardous waste were at any time in effect covering either the foundry or the AAM sites.

14. Environmental Conservation Law § 27-1305(3) established a statewide Registry of Inactive Hazardous Waste Disposal Sites. The GMC and AAM sites are inactive hazardous waste disposal sites that are not listed in the Registry and are not subject to a DEC consent order.

15. The DEC Division of Remediation regulates the clean-up of inactive hazardous waste disposal sites under Title 13 of Article 27 of the Environmental Conservation Law and 6 NYCRR 375. Title 13 requires a remedial investigation and a feasibility study ("RIFS") by the

Division of Remediation to determine the appropriate level of clean-up of each site in the Registry or that is the subject of a DEC consent order. The resulting remediation plan requires input from the New York State Department of Health regarding each site's impact on human health, the DEC Division of Fish and Wildlife regarding environmental issues, and includes input from the general public.

16. In 1996 GMC began filing its returns of special assessments on generation, treatment or disposal of hazardous waste, form TP-550, with the Division. The Division forwarded electronic summaries of the filed TP-550s to DEC, where the summaries were audited by a clerical employee trained to deny the statutory exclusion to filers whose sites are neither on the Registry of Inactive Hazardous Waste Disposal Sites, nor subject to a DEC consent order.

17. GMC sought to avoid a formal remediation plan under Title 13 or a consent order because it was working under tight time constraints for the demolition of the foundry structure, the site clean-up and the construction of its engine plant addition. GMC was concerned that the approval process under a formal remediation plan would cause undue delay to the start of its new engine line.

18. On February 26, 2002, petitioners filed a motion *in limine* with the Division of Tax Appeals, seeking an order precluding the testimony of Division witness, James Vanhoesen, a DEC employee, on the grounds that his testimony would be irrelevant to the proceeding. The Division filed a letter in opposition to the motion. The Administrative Law Judge denied the motion by letter to the parties dated February 27, 2002.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioners assert that they are not liable for payment of the special assessment on generation, treatment or disposal of hazardous waste because they are entitled to and have claimed the benefit of the statutory exclusion of Environmental Conservation Law § 27-0923(3)(c).

20. The Division raises the bench opinion in ***CWM Chemical Services v Roth*** (Supreme Court, Niagara County, March 11, 2002), where section 27-0923(3)(c) was held to be unconstitutional as violating the Commerce Clause of the U.S. Constitution. As a consequence, the Division argues, the Division of Tax Appeals is prohibited from giving effect to this unconstitutional statutory exclusion.

21. In the alternative, the Division asserts that petitioners are not entitled to claim the statutory exclusion because petitioners' inactive hazardous waste disposal sites are neither on the Registry of Inactive Hazardous Waste Disposal Sites, nor are they subject to a DEC consent order.

22. Petitioners submitted proposed findings of fact numbered "1" through "106" and proposed conclusions of law numbered "1" through "25." All proposed findings of fact and conclusions have been substantially adopted in this determination, with the exception of proposed findings of fact "69" and "105" which are not supported by sufficient evidence in the record.

CONCLUSIONS OF LAW

A. Environmental Conservation Law § 27-0923(1)(a) imposes a $27.00 per ton special assessment on each person engaged within New York State in the generation of hazardous waste

that is disposed of in a landfill. Environmental Conservation Law § 27-0923(3)(c) reads as follows:

> For the purpose of this section, generation of hazardous waste shall not include retrieval or creation of hazardous waste which must be disposed of due to remediation of an inactive hazardous waste disposal site in New York state as defined in section 27-1301 of this chapter.

The Division takes the position that because this provision has been held to be unconstitutional in ***CWM Chemical Services v Roth (supra)***, the exclusion from the special assessment is invalid and it follows that the within proceeding is moot.

B. In ***CWM*** the plaintiff, an operator of a licensed hazardous waste treatment and disposal facility located in Niagara County who handled waste generated outside of New York, brought an action for a declaratory judgement declaring section 27-0923(3)(c) to be in violation of the Commerce Clause as a burden to interstate commerce because of the disparate treatment afforded hazardous waste generated outside of New York State in the remediation of inactive hazardous waste disposal sites, which is subject to the special assessment, while hazardous waste generated from such a site located in New York State is exempt from the special assessment by operation of sub-section (3)(c). The Niagara County Supreme Court declared sub-section (3)(c) to be unconstitutional, holding that plaintiff's remedy would be a refund of the special assessments paid as limited by the statute of limitations.

C. By finding that the plaintiff in ***CWM*** was entitled to a refund of taxes (special assessments) paid, the Supreme Court Justice effectively extended the reach of the statutory exclusion from special assessments to include hazardous waste generated outside of New York, thereby leaving the statutory exclusion intact. The Division's contention that the within proceeding was rendered moot by the court's decision in ***CWM*** is rejected.

D. The Division next argues that in order for petitioners to be eligible for the section 27-0923(3)(c) exclusion from special assessments, their sites must either be registered in the Registry of Inactive Hazardous Waste Disposal Sites established pursuant to Environmental Conservation Law § 27-1305(3), or petitioners must be parties to a consent order with DEC. The Division reasons that because the exclusion of section 27-0923(3)(c) is premised on the need to dispose of hazardous waste that is retrieved or created by the remediation of an inactive hazardous waste disposal site as that term is defined in section 27-1301, and because Title 13 does not define the term remediation, the term remediation must be construed in the sense of its use in its immediate statutory context in Title 13, and similarly, the term inactive hazardous waste disposal site too, must be read in the context of Title 13. It then follows, according to the Division, that the remediation of an inactive hazardous waste disposal site referenced in section 27-0923(3)(c) cannot be other than the DEC authorized remediation process of Title 13, where all such sites are required to be registered in the Registry, or alternatively, the subject of a DEC consent order.

E. Title 9 of the Environmental Conservation Law regulates the management of hazardous waste in New York State through a system of permits and manifests that control its generation, collection, storage, transportation, treatment, recovery and disposal. Environmental Conservation Law § 27-0923(1) and (2) impose a range of special assessment rates on persons who generate hazardous waste or operate hazardous waste disposal sites within New York State. The applicable rate is dependent on the manner in which the hazardous waste is to be disposed of. The highest special assessment rate, $27.00 per ton, is imposed on New York generators of hazardous waste or DEC licensed hazardous waste disposal facilities, where the hazardous waste

generated or received for disposal is to be disposed of in a landfill. Section 27-0923(3)(c) provides that hazardous waste retrieved or created from the remediation of an inactive hazardous waste disposal site in New York is excluded from the term hazardous waste. The special assessments paid under Title 9 go into the Hazardous Waste Remedial Fund which is administered by the New York State Superfund Management Board. This Board was created under Title 13 of the Environmental Conservation Law. Title 13 also defines and controls inactive hazardous waste disposal sites that are listed on the Registry, which Registry was created under Title 13. The Registry is a compilation of suspected inactive hazardous waste disposal sites compiled and submitted to DEC by each county outside of New York City pursuant to section 27-1303.

F. The central issue to be determined is whether the absence of the GMC and AAM sites from the Registry, coupled with the lack of a DEC consent order serve to render petitioners ineligible for the Title 9 special assessment exclusion. Inasmuch as the issue involves a statutory exclusion from the imposition of tax, the statute must be construed against the taxpayer and in favor of the taxing authority (***Mobil Oil Corp. v City of New York***, 58 NY2d 95, 459 NYS2d 566). Put another way, the burden of proving entitlement to a tax exemption rests with the taxpayer (***Blue Spruce Farms v State Tax Commission***, 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). Because the subject statutory language is clear and unambiguous, the question presented is one of pure statutory reading and analysis, dependent only on the accurate apprehension of legislative intent (***see, Kurcsics v Merchants Mutual Insurance Co.***, 49 NYS2d 451, 426 NYS2d 454, 458). In such matters the task at hand is reduced to giving effect to the intent of the Legislature and the plain meaning of the words it used (***Matter of 1605***

Book Center, Inc. v Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144, ***cert denied*** 513 US 811, 130 L Ed 2d 19). Resort to extrinsic matter is inappropriate when statutory language is unambiguous and its meaning is unequivocal (***Sega v State of New York***, 60 NY2d 183, 469 NYS2d 51).

G. Nowhere in Article 27 of the Environmental Conservation Law or the regulations promulgated in support of Article 27 is there any language that restricts the availability of the hazardous waste special assessment exclusion to persons engaged in the remediation of inactive hazardous waste disposal sites that are either on the Registry or are the subject of a DEC consent order. The Practice Commentaries to Environmental Conservation Law § 27-1313 make clear that the Title 9 special assessment is directed at hazardous waste generators and disposal site operators. The 1985 New York State Assembly Environmental Conservation Committee Bill Memorandum states that a purpose of the hazardous waste special assessment is to assure that "current hazardous waste generators would have a substantial financial role to play in the remediation of hazardous waste problems." Petitioners, during the period under review, were neither current hazardous waste generators nor operators of hazardous waste disposal sites, but were owners of and responsible parties for an inactive hazardous waste disposal site. The clear legislative purpose of the Title 9 special assessment exclusion is to encourage the remediation of inactive hazardous waste disposal sites in New York State by excluding such sites from the imposition of the special assessment. If responsible parties, such as petitioners, fail to remediate their inactive hazardous waste disposal sites, and the sites constitute significant threats to the environment, DEC is empowered under section 27-1313 to order such parties to remediate their sites or bear the cost of the remediation of the sites. The DEC, during the period at issue, was

never without the authority to compel petitioners to remediate their sites under Title 13. The DEC became aware of the existence of petitioners' inactive hazardous waste disposal sites in 1996 when GMC advised DEC of the presence of PCB contamination and began filing its TP-550 returns with the Division in conjunction with its own remediation plan. There is no suggestion in the record that GMC's remediation efforts respecting its site and that of AAM were in any way inadequate. Throughout the clean-up of petitioners' sites, GMC corresponded with and had on-site inspections by personnel from the DEC Division of Water and the Division of Solid and Hazardous Materials, although never with the Division of Remediation which is responsible for Title 13 remediation plans.

H. The Governor's 2002 Budget Bill received in evidence sets forth the Executive's proposed amendment to section 27-0923(3)(c) which would limit the hazardous waste special assessment exclusion to hazardous waste that is retrieved from a site that is subject to an order or agreement with DEC pursuant to Title 13, or the yet to be enacted Title14 Voluntary Cleanup Act, or Title 5 of Article 56 relating to contracts with municipalities for environmental restoration projects. The Division offered these proposed statutory changes to the hazardous waste special assessment exclusion as evidence of the Executive's intent to limit the availability of the exclusion to sites listed in the Registry or subject to DEC consent orders during the periods under review. The Division's premise is rejected, not only because the proposed amendment was never enacted, but also for the reason that even if it had been enacted, the amendment would not serve to retroactively declare a different legislative intent contrary to the plain meaning of the present section 27-0923(3)(c) (***see, Boltja v Southside Hospital***, 186 AD2d 774, 589 NYS2d 341).

I. Petitioners have met their burden of proof and are entitled to the benefit of the Environmental Conservation Law § 27-0923(3)(c) hazardous waste special assessment exclusion. The petitions of General Motors Corporation and American Axle and Manufacturing, Inc. are granted and the notices of deficiency are canceled.

DATED: Troy, New York
February 27, 2003

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE