STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	
	:	DETERMINATION
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.	:	
	:	

Petitioner, Island Waste Services, Ltd., filed petitions 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.

Petitioner, Island Waste Services, Ltd., f/k/a Selas Enterprises, Ltd.,[1] filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the

[1] On June 29, 2004, Selas Enterprises, Ltd., changed its name to Island Waste Services, Ltd.

Tax Law for the period March 1, 1997 through November 30, 1999. A consolidated[2] hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 18, 2007 at 10:30 A.M., with all briefs to be submitted by November 19, 2007, which date began the six-month period for the issuance of this determination. Petitioners appeared by Kenneth I. Moore, Esq., and Stephen Solomon, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall [at hearing], James Della Porta, Esq. [on brief]).

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

1. 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

[2] Seventeen other matters were consolidated for hearing with the three petitions captioned above. The parties stipulated on April 18, 2007, in a series of 10 similarly worded stipulations that a final and ultimate decision rendered in the 3 matters captioned above would be binding upon the other 17 matters, which are listed in the Appendix at the end of this determination.

subsidiary, petitioner[3] 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.

2. 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.

3. 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.[4] 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, 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

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[3] References in this 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.

[4] 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 Finding of Fact 7, in Brookhaven on Long Island there was a landfill accepting construction and demolition material.

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

4. 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.

5. The New York State Department of Environmental Conservation (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 demoliton [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.
>
> 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.
>
> 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.

6. 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[5] 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

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[5] It is observed that the terminology used in the later permit was "municipal" solid waste rather than "mixed" solid waste, as noted in Finding of Fact 5. 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.

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.

7. 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 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.[6] 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.

8. 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.,

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[6] 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."

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[7] plus interest for a 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.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner contends that the transportation of materials from its Long Island waste transfer station for ultimate disposal, generally out of state, was a nontaxable transportation service. According to petitioner, the Division had never sought to impose a sales tax on the transportation of waste from a transfer station until its issuance of an advisory opinion to Paper Fibres Corporation in May 1997 (TSB-A-97[3])S). Subsequently, the State Legislature amended the Tax Law to explicitly bar the Division from imposing sales tax in such circumstances, with legislative history noting that the Division's reasoning in its advisory opinion was "strained" and "beyond that contemplated by the Legislature when it sought to impose a tax on the services of maintaining real property." Petitioner points out that "[t]aking the Division's position to its logical conclusion, the shipment of manufactured goods from the factory that created them could be considered the maintenance of property."

[7] 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..

10. The Division argues that the shipment of waste from petitioner's Long Island transfer station was a taxable maintenance service of the transfer station rather than a nontaxable transportation service. Removing the waste from the transfer station "was necessary to maintain Island Waste's facility. . . ." The Division contends that if the amendment of the law in 2005 was merely a clarification, there would not have been a "transitional provision in the legislation" of at least 60 days after enactment before the amendment became effective. Rather, the Division argues the amendment was a substantive change to the law.

CONCLUSIONS OF LAW

A. The parties are in agreement that when petitioner removed waste from its customers' premises in New York, either residential or commercial, it was providing taxable services to its customers' real property as provided in Tax Law § 1105(c)(5) since such services met the statutory language emphasized below of "maintaining, servicing or repairing real property." Sales tax was imposed and paid on such "*integrated* removal, transportation and disposal services" which represented the provision of trash removal services to its customers (Petitioner's brief, p. 16 [emphasis added]). They also agree 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 are in agreement 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. Instead, what is in dispute between the parties is whether petitioner owes 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 does not challenge the calculations performed by the Division to determine the amount of sales tax assessed on the transactions in question, but rather challenges the Division's determination that such transactions were taxable in the first instance.

B. Tax Law § 1105(c)(5), for the portion of the audit period through February 28, 2001, imposed a sales tax on receipts from the services of:

> *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 services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding 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. (Emphasis added.)

For the portion of the audit period starting March 1, 2001 and later, this provision was amended to include an additional exclusion for "services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production of tangible personal property, for sale, *by farming*" which is not at issue in this matter. Consequently, the specific statutory language to be analyzed, in determining whether the charges paid by petitioner for the removal and transport of waste from its Long Island transfer station, is whether such services represented "*Maintaining, servicing or repairing real property*."

C. 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 the specific services at issue here:

> (iv) 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.

Consequently, the Division agrees that hauling or transportation charges like those paid for the removal of waste material from a facility such as petitioner's Long Island waste transfer facility have been excluded from the imposition of sales tax since December 1, 2005. Nonetheless, despite this effective date after the period at issue, the fact that the Legislature amended the statute to exclude from tax the removal of waste material from a facility such as petitioner's Long Island waste transfer facility does *not* automatically mean that the Division's interpretation of the earlier version of Tax Law § 1105(c)(5) was valid (***see Matter of Dreyfus Special Income Fund, Inc. v. State Tax Commission***, 72 NY2d 874 [1988]). Rather, a review of the relevant legislative history (Governor's Bill Jacket, L 2005, ch 321), establishes that the Division's interpretation, as outlined in an advisory opinion issued to Paper Fibres Corp. in May 1997 (TSB-A-97[32][S]), 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 Division's reliance on the decision of the Tax Appeals Tribunal in ***Matter of New York Life Insurance Company and Subsidiary*** (August 4, 1994) is misplaced since here the legislative history is clear that the amendment was a clarification and not a substantive change. Furthermore, it is noted that advisory opinions are not binding or otherwise precedential (***see Matter of Bausch and Lomb***, Tax Appeals Tribunal, December 20, 2007; Tax Law § 171[24]). Moreover, as discussed below, this advisory opinion relied upon a forced and contorted reading of the relevant statutory language to hold that transportation charges paid to

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

remove waste from a waste transfer facility to ultimate disposal at another facility represented the maintaining or servicing of real property.

D. In analyzing the earlier version of Tax Law § 1105(c)(5) (as in effect during the period at issue and which did not include the explicit exclusion for the hauling or transportation charges at issue), it is a well-established principle of statutory interpretation that any ambiguities must be construed *against* the Division and in favor of the taxpayer since the statute at issue defines what service activities are subject to tax, rather than creates an *exception* to the imposition of sales tax (***see Matter of A-Z Parking Services, Inc.***, Tax Appeals Tribunal, October 6, 1994).

E. The picking up of waste from homes and businesses that generate waste, the transportation of the waste from such sites, and its 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 e.g. Matter of Rochester Gas & Electric Corp. v. State Tax Commn.***, 128 AD2d 238, 516 NYS2d 341[1982], ***affd*** 71 NY2d 931, 528 NYS2d 810 [1988]). The statutory language at issue supports the taxability of such integrated services since they represent the "maintaining" or "servicing" of real property. Here, however, there are no such *integrated* activities at issue. Rather, the Division has sought to tax a separate and distinct transportation service since, most important, petitioner's Long Island transfer station did not generate the waste. The Division's reliance on the decision of the Tax Appeals Tribunal in ***Matter of Auburn Steel Company*** (September 13, 1990) is misplaced. In that case, the particulate dust, which was removed from the customer's premises as trash, was generated at such premises. In the matter at hand, under the oversight of governmental inspectors, petitioner at its Long Island transfer station prepared trash for further transport, generally out of state, for ultimate disposal. As noted in Footnote 6, the primary reason for using a transfer station, in the language of the United States Environmental

Protection Agency, is "to reduce the cost of transporting waste to disposal facilities." In sum, the transportation of the waste in these circumstances is not done to maintain petitioner's real property, but rather was part of and inherent to its mandated, governmentally regulated obligation as a waste transfer station permit holder. Simply stated, instead of a taxable "maintaining" or "servicing" of real property, the hauling charges at issue are properly viewed as nontaxable transportation charges (***see*** 20 NYCRR 526.5(g)(3) [which provides that "a charge for transporting or delivering property by a transportation or delivery company to the . . . business requesting that the property be transported or delivered is not a receipt subject to tax, since transportation and delivery are not themselves services subject to tax"]). Any other interpretation of the statutory language of "maintaining, servicing or repairing of real property" so as to make such transportation services taxable would be a forced and contorted interpretation which is rejected in favor of a "fair and practical" construction in accord with the intention of the Legislature (***see Matter of 1605 Book Center v. Tax Appeals Tribunal***, 83 NY2d 240, 609 NYS2d 144, ***cert denied*** 513 US 811,130 L Ed2d 19).

F. The two petitions of Island Waste Services, Ltd., and the petition of Island Waste Services, Ltd., f/k/a Selas Enterprises, Ltd., are granted, and 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 cancelled, and a payment/credit of $6,664.17, as noted in Footnote 7, shall be refunded to petitioner.

DATED: Troy, New York
May 8, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE

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[9]	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

[9] 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).