STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **DVL, INC.** | : | DECISION<br>DTA NO. 824165 |
| 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 Year 2006. | : | |

Petitioner, DVL, Inc., and the Division of Taxation, each filed an exception to the determination of the Administrative Law Judge issued on November 21, 2013. Petitioner appeared by Nolan & Heller, LLP (David A. Engel, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford Peterson, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception. Petitioner filed a brief in opposition to the Division of Taxation's exception and in reply to the brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard in Albany, New York on October 15, 2014, which date began the six-month time period for the issuance of this decision.

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

## *ISSUES*

I. Whether petitioner's transportation of hazardous waste while engaging in the remediation of a site containing hazardous waste constitutes the "generation of hazardous waste" within the meaning of Environmental Conservation Law § 27-0923 (3) (c).

II. Whether petitioner is not subject to the special assessment imposed on persons generating hazardous waste because it acted under an agreement with the Department of Environmental Conservation pursuant to ECL § 27-0923 (3) (c).

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for findings of fact 4, 7, 8, 9, 10, 11 and 14, which have been modified to more accurately reflect the record. We have also made an additional finding of fact, numbered 16 herein. The Administrative Law Judge's findings of fact, modified findings of fact and additional finding of fact are set forth below.

1. During the period of time relevant to this proceeding, petitioner, DVL, Inc., (DVL), conducted business as a mortgage finance company, general partner of partnerships and owner of real estate. It did not engage in any industrial processes as part of its business nor did it undertake any commercial activities that involved the generation or creation of hazardous waste and materials.

2. Fort Edward Associates was the owner of a parcel of real property located at 354 Upper Broadway, Fort Edward, New York (DVL site). The property was leased to the Grand Union Company. In 2002, DVL acquired the property by foreclosure after Fort Edward Associates defaulted on the mortgage. The area where this property is located is known as the Upper Broadway Barrel Site in the Town of Fort Edward (Upper Broadway Site).

3. In August 2003, Mr. James Ludlam, on behalf of the Department of Environmental Conservation (DEC), approved the performance of a Preliminary Site Assessment (PSA) of the Upper Broadway Site. In general, the purpose of the PSA was "to determine whether waste has been disposed on site and, if so, whether this disposal has impacted or threatens to impact human

health and/or the environment" (Work Plan for Preliminary Site Assessment at the Upper Broadway Site Fort Edward, New York).

4. The PSA was conducted by the firm of Ecology and Environment Engineering, P.C. (E & E) on behalf of DEC. E & E collected and tested subsurface soils as well as performed test pit excavations and sampling on the DVL site. On the basis of the test pit excavations and sampling, DEC requested that DVL investigate and possibly remediate the area of two test pits. The area was southeast of the former Grand Union store and east of a nearby Agway establishment. DVL agreed to DEC's request and retained Malcolm Pirnie, Inc. (MPI) to perform the investigation of the test pits.

5. In October 2004, E & E issued the Report for the Preliminary Site Assessment at the Upper Broadway Site, Fort Edward, New York (PSA Report). The PSA Report found that polychlorinated biphenyls (PCB) waste was present at the DVL site "above their screening criteria in two test pit subsurface soil samples" and "well above criteria in one localized subsurface soil test pit sample." DEC never identified the source of the PCBs.

6. Mr. Ludlam informed DVL that it was necessary to remove the PCB-contaminated soil in the area of the test pits.[1] Consequently, MPI, on behalf of DVL, developed a work plan for the removal and disposal of soil containing PCBs in the area of the two test pits. In a letter dated December 2, 2004, MPI submitted the work plan to DEC via a letter to Mr. Ludlam. On December 7, 2004, Mr. Ludlam sent an e-mail to Mr. Bruce Nelson of MPI approving the

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[1] The Division of Taxation (Division) argues on exception that the record, while supporting separate findings that Mr. Ludlam both (1) told DVL about the report and (2) concluded that removal of the contaminated soil was necessary, does not support a finding that Mr. Ludlam told DVL that it was necessary to remove the contaminated soil. However, Mr. Carames, an employee of DVL, testified at the hearing that he was told by Mr. Ludlam that it was necessary to remove the contaminated soil. We defer to the Administrative Law Judge who heard the testimony at the hearing and appears to have found Mr. Carames' testimony on this point credible (***see Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992).

remedial work plan.

7. In accordance with the December 2, 2004 approved work plan, MPI, on behalf of DVL, removed the PCB-contaminated soil identified in the PSA. The remediation effort consisted of the excavation, removal and disposal of the soil. Mr. Ludlam, on behalf of the Division of Environmental Remediation of DEC, witnessed the soil remediation effort as well as the confirmation sampling that followed. Thereafter, on February 28, 2005, MPI, on behalf of DVL, submitted a closure report to DEC. On March 9, 2005, Mr. Ludlam mailed a letter to petitioner that stated:

> "Having reviewed and approved the closure report prepared by MPI (February 28, 2005), I can attest that the removal was conducted to the State's satisfaction and in full compliance with the approval plan . . . . The Department will administratively reclassify the site from Category P to D4 indicating it is not appropriate to classify the site as a listed inactive hazardous waste site. The Department has no further concerns with the site."

The investigation, sampling and testing, as well as the removal and disposal, of the soil from the DVL site, was reviewed and approved by DEC.

8. In the fall of 2005, a consultant's review of the PSA Report prompted DVL, through MPI, to voluntarily undertake an additional investigation of the DVL site to ascertain if additional PCB-contaminated soil was present. Additional soil sampling was conducted between October of 2005 and March of 2006. The result of this sampling was the discovery of additional contaminated soil, the presence of which was reported to DEC by DVL. DEC advised DVL that an additional work plan should be submitted because the level of the contamination required further excavation and removal.

9. In a letter dated June 19, 2006, MPI submitted an additional work plan for the removal and disposal of the PCB-contaminated soil. Sometime between June 19th and August 12th of

2006, MPI discovered additional PCB-contaminated soil on the DVL site. In a letter dated August 1, 2006, DVL submitted a supplemental work plan, related to its latest discovery to DEC. In a letter dated August 12, 2006, DEC advised DVL that it approved the June 19, 2006 and August 1, 2006 work plans. Such letter contained a request that, as in the past, MPI coordinate the site activities with Mr. Ludlam to enable him to "attest first hand that the work was conducted as proposed."

10. During the period October through December 2006, DVL undertook the task of removing the PCB-contaminated soil from the DVL site. Before and during the remediation process, DVL communicated with DEC regarding its removal activities, including informing DEC of the anticipated commencement of the removal activities on October 17, 2006, seeking DEC guidance pertaining to certain removal activities and submitting progress reports to DEC. The investigation, sampling and testing, as well as the removal and disposal, of the soil from the DVL site, was reviewed and approved by DEC.

11. In order to engage in transporting the PCB-contaminated soil, DVL submitted to DEC 54 Uniform Hazardous Waste Manifest forms. The forms were completed by DVL listing itself as "Generator" and listing its "Generator ID number" as NYR00129171. The Uniform Hazardous Waste Manifest form is a standardized form that does not distinguish between the transportation of hazardous waste from ongoing operations versus the transportation of waste from remedial efforts. Thereafter, DVL submitted to the Division, a form TP-550-MN, dated January 19, 2007, stating that each ton of hazardous waste removed from the DVL site during the foregoing period was done so "under an order of, or agreement or contract with, the New York State Department of Environmental Conservation." This form listed NYR00129171 as DVL's "Environmental Protection Agency number."

12. DVL commenced an action against, among others, General Electric Company, Niagara Mohawk Power Company and National Grid Service Company, Inc., in order to obtain a recovery of costs it incurred as a result of its investigation and remediation of the DVL site. DVL was unsuccessful in this action (***DVL, Inc. v General Electric Company***, 811 F.Supp 2d 579 [2010], ***affd*** 490 Fed.Appx 378 [2012]).

13. On the basis of a review of the Uniform Hazardous Waste Manifest forms, the Division issued a Discrepancy Statement of Audit Adjustment to DVL, dated November 24, 2009, that asserted a deficiency of $43,173.00 plus interest for a total assessment of $66,298.57. The Discrepancy Statement explained that it was based upon the transportation of 1,599 tons of hazardous waste.[2] On December 30, 2009, the Division issued a notice of deficiency to DVL that asserted tax due in the amount of $43,173.00 plus interest for a balance due of $67,286.51.

14. Mr. Ludlam was employed by DEC from September 1977 through his retirement in 2008. In 1978, he obtained his Professional Engineer's license. From 1978 through his retirement in 2008, his duties with DEC pertained almost exclusively to the investigation, assessment, remediation, and closure of hazardous waste disposal sites. From 2004 through 2007, Mr. Ludlam was employed with DEC's Remedial Bureau D in the Division of Environmental Remediation.[3]

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[2] DVL had reported that it had generated 1,303.2 tons of hazardous waste on its Uniform Hazardous Waste Manifest forms.

[3] The Administrative Law Judge found, consistent with the Division's position, that Mr. Ludlam did not have "the authority to execute an order or agreement on behalf of the DEC pursuant to Titles 13 or 14 of Article 27 of the Environmental Conservation Law" (Determination, Finding of Fact 14) (Title 13 and Title 14 respectively). This finding was apparently based upon the testimony by affidavit and at the hearing held in this matter, of Robert W. Schick, who at the time of the hearing was the Director of the Division of Environmental Remediation at DEC. However, Mr. Schick's testimony, and therefore the finding of the Administrative Law Judge, was based upon the premise that there only exist very specific types of orders under Title 13 and agreements under Title 14. As discussed in our opinion, we find this premise faulty.

15. DVL never applied for participation in the Brownfield Cleanup Program pursuant to Title 14 of Article 27 of the Environmental Conservation Law.

16. Mr. Ludlam, in his capacity as an employee of DEC, was responsible for the oversight, review and approval of investigative and remedial activities at the DVL site. Mr. Ludlam was acting with the knowledge, and at least implied consent, of his supervisor and others at DEC regarding his work on the DVL site.

Mr. Ludlam testified in his July 2010 affidavit that:

> "[O]n behalf of DEC, I had an ongoing agreement with Mr. Charles Carames of DVL that DVL would undertake remedial or removal actions at the DVL Site with respect to the PCB contamination at the DVL Site subject to my review and approval on behalf of DEC. This understanding or agreement was never reflected in a specific written document. However, all of DVL's actions at the site which resulted in the excavation and removal of wastes were conducted subject to my review and approval on behalf of DEC. For this reason, it should be understood that DVL's remedial on removal actions at the DVL Site proceeded on the basis of an agreement with DEC."

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first explained that this matter involved the interpretation of various titles of Article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste), of the Environmental Conservation Law, specifically: Title 9 designed to "regulate the management of hazardous waste (from its generation, storage, transportation, treatment and disposal) in this state and to do so in a manner consistent with" certain federal statutes in this area (ECL § 27-0905); Title 13 designed to control inactive disposal sites (L 1079 ch 282 § 1); and Title 14, known as the Brownfield Cleanup Program, "designed to facilitate the remediation of parcels contaminated by hazardous waste and restore them to the tax roles" (Philip Weinburg, Practice Commentaries, McKinney's Cons Laws of New York, ECL § 27-1401). The Administrative Law Judge then explained that, at issue, was a provision in Title 13 that imposed

a special assessment "upon every person who is engaged within the state in the generation of hazardous waste . . . " (ECL § 27-0923) (Special Assessment).

The Administrative Law Judge found that while the Legislature had not defined the phrase "generation of hazardous waste" for purposes of Environmental Conservation Law § 27-0923 (1), it had directed that the generation of hazardous waste was to be regulated in a manner consistent with the Federal Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and as further amended by certain subsequent legislation (ECL § 27-0900). Furthermore, that Environmental Conservation Law § 27-0900 also provided that "[N]othing in this title shall authorize the department to adopt or amend any rule or regulation in a manner less stringent than provided in RCRA." The Administrative Law Judge concluded that the foregoing provision clearly established that RCRA and Title 9 of the Environmental Conservation Law are *in pari materia* and should be interpreted in a consistent manner (McKinney's Cons. Laws of NY, Book 2 Statutes, § 221).

The Administrative Law Judge then explained that "generator" was defined in regulations adopted by the federal Environmental Protection Agency (EPA) for purposes of RCRA, as any person "whose act first causes a hazardous waste to become subject to regulation" (40 CFR 260.10; ***see also*** 6 NYCRR 370.2 [b] [83]). The Administrative Law Judge pointed to guidance provided by the EPA that expounded on this definition as follows: "[W]aste is not subject to hazardous waste regulation unless the waste is physically disturbed (e.g., exhumed). Once a person excavates the waste, he or she is considered the generator since his or her act first caused the waste to become subject to hazardous waste regulation" (EPA, RCRA Training Module: *Introduction to Generators*, [40 CFR Part 262] p.15, September 2005). Relying on the foregoing

analysis, the Administrative Law Judge determined that as the hazardous waste in issue became subject to regulation when petitioner excavated and disposed of it, DVL was "engaged within the state in the generation of hazardous waste" within the meaning of Environmental Conservation Law § 27-0923 (1).

The Administrative Law Judge rejected DVL's argument that the hazardous waste at issue was not subject to the Special Assessment under Environmental Conservation Law § 27-0923 (3) (c) because it had an agreement with DEC under Title 13. The Administrative Law Judge concluded that Title 13 does not authorize DEC to enter into an agreement, but rather, only authorizes DEC to issue an order pursuant to Environmental Conservation Law § 27-1313 (3) (a). Moreover, the Administrative Law Judge determined that DVL's approved work plan could not be construed as an agreement, and, in any event, Mr. Ludlam did not have the authority to enter into an agreement on behalf of DEC.

***ARGUMENTS ON EXCEPTION***

In support of its exception in this matter, petitioner continues to maintain that the Special Assessment imposed under Environmental Conservation Law § 27-0923 (1) was erroneous because petitioner's remediation of the DVL site did not constitute the "generation of hazardous waste." Citing ***Debevoise and Plimpton v New York State Depart. of Taxation & Fin.***, 80 NY2d 657 (1993), petitioner argues that statutory words of ordinary import should be given their usual and commonly understood meaning and that, in this case, petitioner's removal of hazardous waste, not put there by petitioner, cannot under any common understanding of the word generate, be considered the "generation of hazardous waste" (ECL§ 27-0923 [1]).

Additionally, petitioner continues to argue that, as it had an agreement with DEC regarding the disposal of the hazardous waste at the DVL site, it is not subject to the Special Assessment. Specifically, it is petitioner's position that its repeated communications with DEC, its submissions of its work plans to DEC and DEC's approvals of those work plans constituted an agreement under Environmental Conservation Law § 27-0923 (3) (c).

Lastly, petitioner submits that since it inherited the hazardous waste from a prior owner, voluntarily engaged in investigations that found the hazardous waste on the site, advised DEC of the hazardous waste, secured DEC's examination and approval of the removal plan, and bore a significant expense in removing the waste, a conclusion that DVL is not subject to the Special Assessment is necessary in order to promote the goal of encouraging the removal of hazardous waste from contaminated sites.

In support of its exception filed in this matter, the Division argues that petitioner did not prove that the DVL site was an "inactive hazardous waste disposal site" as defined in Environmental Conservation Law § 27-1301 (2) and, therefore, even if Title 13 allowed DEC to enter into agreements, petitioner could not have entered into an agreement with DEC pursuant to Title 13. The Division notes that it raised this argument before the Administrative Law Judge, although it was not addressed in the determination of the Administrative Law Judge.

In opposition to the Division's exception, petitioner asserts that the Division's arguments are based upon a distortion of the record. Furthermore, petitioner asserts that the Division's argument that petitioner did not prove that the DVL site was an "inactive hazardous waste disposal site" is contrary to both common sense and the record in this matter.

In response to petitioner's exception, the Division primarily relies upon the determination of the Administrative Law Judge with regard to the issue of whether petitioner's remediation of the DVL site did not constitute the "generation of hazardous waste" (ECL § 27-0923 [1]). With regard to the issue of whether petitioner had an agreement with DEC as required by Environmental Conservation Law § 27-0923 (3) (c), the Division, relying on ***Matter of The Golub Corp.***, Tax Appeals Tribunal, May 31, 2012, confirmed sub nom ***Matter of Golub Corp. v New York State Tax Appeals Trib.***, 116 AD3d 1261 (2014), argues that where a statutory provision requires a specific type of agreement, this Tribunal may not extend the meaning of the statute by allowing something other than that specific type of agreement.

***OPINION***

As noted, petitioner continues to assert on exception that the Special Assessment imposed under Environmental Conservation Law § 27-0923 (1) was erroneous because petitioner's remediation of the DVL site did not constitute the "generation of hazardous waste." Because the Administrative Law Judge adequately addressed this argument in his determination, we affirm the determination of the Administrative Law Judge on this issue for the reasons stated therein.[4]

The Division continues to assert on exception that petitioner has not proven that the DVL site was an "inactive hazardous waste disposal site" as defined in Environmental Conservation Law § 27-1301 (2). The Division seems to assert that petitioner had to prove that the DVL site

[4] Not relied on by the Administrative Law Judge were the facts that the Uniform Hazardous Waste Manifest forms do not differentiate between the transportation of hazardous waste from ongoing operations versus the transportation of hazardous waste from remedial efforts, and that petitioner lists itself as a "Generator" with a "Generator ID number" on those forms. Contrary to petitioner's arguments, we find that these facts support the Division's argument that petitioner was a generator of hazardous waste (***see*** Finding of Fact 11).

was on the National Priorities List during the period of the excavation and removal of the hazardous waste. While inclusion on the National Priorities List established by authority of 42 USCA § 9605 makes a site an "inactive hazardous waste disposal site," as defined by Environmental Conservation Law § 1301 (2), such sites include "any area or structure used for the long term storage or final placement of hazardous waste." To the extent that the Division is now arguing that petitioner has not proven that there was hazardous waste at the DVL site, we will not address that argument as it is a factually dependent argument that was not made before the Administrative Law Judge (***see Coram Diner Corp.***, Tax Appeals Tribunal, March 12, 2015).

The crux of this matter is whether petitioner is not subject to the Special Assessment because it had an agreement with DEC under Environmental Conservation Law § 27-0923 (3) (c), which provides as follows:

> "Generation of hazardous waste shall not include retrieval or creation of hazardous waste which must be disposed of under an ***order of or agreement with the Department pursuant to Title 13 or Title 14***" (emphasis added).

This issue is one of statutory interpretation, where our duty is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. of City of N.Y. v City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51 [d]). Where no ambiguity exists, "the court should construe it so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. of City of N.Y.*** at 208). Generally, words of ordinary import are to be given their ordinary and usual meaning (McKinney's Cons Laws of NY, Book 1, Statutes § 232).

We agree with petitioner that the determination of the Administrative Law Judge, based upon the Division's interpretation of the statute, misconstrues the clear language of the statute by effectively requiring that the statute be impermissibly rewritten as follows:

> "Generation of hazardous waste shall not include retrieval or creation of hazardous waste which must be disposed of under an ***order of the Department pursuant to Title 13 or an agreement with the Department pursuant to Title 14***" (emphasis added).

Initially, we must address whether there was an agreement between petitioner and DEC regarding the remediation of the DVL site. There is no requirement in the statute that such an agreement be in writing. Mr. Ludlam very specifically states that he, on behalf of DEC, "had an ongoing agreement" with DVL that it would undertake the remediation of the DVL site subject to the review and approval of DEC. Furthermore, the entire record is replete, and the Administrative Law Judge so found, that Mr. Ludlam was in charge of and oversaw the entire remediation at the DVL site and that he did so on behalf of DEC (***see*** Findings of Fact 6 through 10 and 16).

Although this appears to answer the question as to whether there was an agreement in the affirmative, the Administrative Law Judge found that petitioner had submitted to DEC, and received approval from DEC, of a "work plan" and did not have an "agreement" with DEC pursuant to Environmental Conservation Law § 27-0923 (3) (c).

There are several problems with the analysis of the Administrative Law Judge. Initially, the Administrative Law Judge explained that the words "order" (ECL § 27-1405), "work plan" (ECL §§ 27-1407 [2]; 27-1441) and "agreement" (ECL § 27-1405 [4]) have specific meanings under the relevant statutes and are not interchangeable. However, the sections of the statute cited by the Administrative Law Judge are contained in Title 14, having to do with the Brownfield

Cleanup Program (ECL §§ 27-1405, 1407 [2], 1441, and 1405 [4]). As the Administrative Law Judge specifically found that DVL had not applied to participate in that program, this analysis is not relevant to petitioner's assertion that it had an agreement with DEC pursuant to Title 13.

Furthermore, as noted by petitioner, the determination of the Administrative Law Judge concludes that petitioner merely submitted a work plan that was approved by DEC and ignores that there was repeated communication between petitioner and DEC and that the investigation, sampling and testing, as well as the removal and disposal, of the soil from the DVL site were reviewed and approved by DEC (***see*** Findings of Fact 6 through 10 and 16).

Finally, the Administrative Law Judge, and the Division, rely on ***Matter of The Golub Corp.***, for the proposition that where a statutory provision requires a specific type of agreement, this Tribunal may not extend the meaning of the statute by allowing something other than that specific type of agreement. While we agree with the general proposition, we find that ***Golub*** is not only distinguishable, but supports our conclusion that petitioner and DEC had an agreement as contemplated by Environmental Conservation Law § 27-0923 (3) (c). The question in ***Golub*** was whether payments in lieu of taxes made by petitioner therein were "eligible real property taxes" for purposes of Tax Law former § 15 (e). In order for payments in lieu of taxes to be considered "eligible real property taxes" under Tax Law former § 15 (e), the payments were required to be made "pursuant to a ***written agreement*** entered into between the QEZE and the state, municipal corporation or public benefit corporation" (emphasis added). Petitioner in ***Golub*** could not produce such an agreement. The specific type of agreement required in the present case is one under Title 13. It is not required to be a written agreement. Nor does the statute require that it be an agreement executed under any particular section of Title 13 as argued

by the Division (ECL § 27-0923 [3] [c]). As evidenced by the statute at issue in ***Golub***, the Legislature knows how to express its intention that an agreement be a specific type of agreement and it did not do so here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of DVL, Inc., is granted;

2. The exception of the Division of Taxation is denied;

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

4. The petition of DVL, Inc. is granted; and

5. The notice of deficiency, dated December 30, 2009, is canceled.

DATED: Albany, New York
April 15, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner