New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

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Sales Tax
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Counsel Opinion - May 7, 1992

This Opinion of Counsel, dated May 7, 1992, was issued with respect to the applicability of sales and compensating use taxes to trash removal services in light of the decision of the Tax Appeals Tribunal in Matter of General Electric Company.

WILLIAM F. COLLINS, Counsel.-- The Division of Taxation has received a number of inquiries regarding the imposition of the sales and compensating use taxes on various transactions for removal and/or processing of waste or trash (hereinafter "trash") in the aftermath of the Tax Appeals Tribunal's decision in the Matter of the Petition of General Electric Co., DTA No. 800844. This opinion addresses these inquiries in light of the statute, the regulations, and recent decisions.

In the main, the confusion prompting the inquiries seems to have resulted from the misstatements by the petitioner in arguments proffered to the Tribunal concerning the sales taxes imposed on integrated trash removal services. The "internal consistency test," garnered from a United States Supreme Court decision involving the avoidance of unconstitutional discrimination against interstate commerce, (Goldberg v. Sweet 488 US 252, 260-261), was correctly applied to an incorrect depiction of the facts and law at issue.

Generally, pursuant to section 2016 of the Tax Law the Department has been precluded from seeking judicial review of decisions of the Tax Appeals Tribunal. If an error is not one of an action taken in excess of jurisdiction or a decision founded on constitutional interpretation of a state statute which is beyond the power of an administrative adjudicatory body, judicial review is not available. New York City Dept. of Environmental Protection v. New York State Civil Service Commission 78 NY2d 318.

The line between whether the Tribuna!'s decision constituted a finding that the statute was unconstitutional on its face or whether it was only a misapplication of the law to the facts in the particular case is not sufficiently clear in this case so that the availability of judicial review can be determined at this juncture. Therefore, the best interests of clear and consistent administration of the sales tax in this area of law will be served by (1) viewing the General Electric decision as restricted to the specifics of that particular matter as pled and argued, and (2) a clear explanation of the Division of Taxation's consistent administrative position consistent with the law as written and interpreted by the courts.

Section 1105(c) of the Tax Law imposes a sales tax on receipts from the sale, other than for resale, of certain enumerated services. The situs for the taxable event under section 1105(c) is found where the service is delivered (20 NYCRR 526.7(e)[1]). Section 1105(c)(5) provides as follows:

> (5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Because the tax imposed by section 1105(c)(5) relates to enumerated services to real property (including trash removal), the only rational situs of the taxable event under the sales tax (a "transactional" tax) is the location of the real property. The entire receipt for an integrated trash removal service of pickup, transport, processing, and disposal is subject to tax under section 1105(c)(5), if the real property is located within New York (Matter of Cecos Int'l Inc. v. State Tax Comm., 71 NY2d 934; Matter of Auburn Steel Co., Inc., Tax Appeals Tribunal, September 13, 1990). A transaction involving an integrated service of trash removal from real property located outside the State of New York (even if ultimate processing or disposal occurs within this State) would, under the provisions of the New York statute, have a taxable situs outside the State of New York and would therefore not be subject to sales or use tax by or pursuant to Articles 28 and 29 of the Tax Law.

Section 1105(c)(2) of the Tax Law imposes tax on every sale, except for resale, of the service of:

> (2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

The situs of the taxable event under section 1105(c)(2) is determined by the location where the service of processing tangible personal property is delivered. If tangible personal property (e.g., trash) upon which services taxable under such section are to be performed is transported out of this State and such property is processed out of state, and the property is not thereafter delivered to the customer within this State for use in this State, the situs of the taxable event will be outside the State of New York, and the receipts from the sale of such section 1105(c)(2) service would not be subject to tax under or pursuant to Articles 28 and 29. In contrast, if tangible personal property is sent into this State and a section 1105(c)(2) service is performed on the property here, and the property is not delivered to the taxpayer outside this State, the situs for the taxable event is within this State and the

receipts from the sale of such service would be subject to the tax imposed under such section and pursuant to Article 29.

The taxes imposed by section 1105(c)(2) and section 1105(c)(5) are mutually exclusive. A particular transaction can be subject to only one of these provisions. Where the customer itself transports its own waste to a location within this State to be processed by the service provider, the service of processing the waste is a separate and distinct transaction subject to the tax imposed under section 1105(c)(2) (Cecos Int'l., supra). In contrast, if a vendor arranges for the pickup of waste from the customer's real property in New York and transports it to a processing and disposal facility, the transaction constitutes an integrated trash removal service subject to tax under section 1105(c)(5), whether such vendor provides the processing and disposal services or only transports the waste to the processing and disposal facility. (Cecos Int'l, supra; Auburn Steel, supra). This will be true whether the service provider performs the entire service itself or hires others to perform one or more of the components (Cecos Int'l, supra).

Where a transaction involves an integrated trash removal service of pickup and transportation, and which also may include the service of processing and disposal of the trash, the taxable receipt includes the total amount charged, without any reduction for costs of any component of that integrated service, such as containers (U-Need-A Roll Off Corp. v. NYS Tax Commn, 67 NY2d 690), transportation (Cecos Int'l, supra), processing of the waste (Cecos Int'l, supra), or dumping or tipping fees (Matter of Penfold v. State Tax Comm, 114 AD2d 696). Regardless of the taxable status of the cost components of the service, the vendor's entire receipt is subject to tax if the real property from which the trash is removed is located within this State. None of the receipt is subject to tax if that real property is located outside this State.

Separately stating a charge for a component cost of an integrated trash removal service does not change the character of the integrated service and does not mean that separate services distinct from an integrated 1105(c)(5) service are being performed; Cecos Int'l, supra, U Need A Roll Off, supra, Penfold, supra). Accordingly, the portion of the receipt from the sale of such a trash removal service attributable to the processing component of such service could not be subject to a separate, mutually-exclusive tax under section 1105(c)(2).

Where a vendor hires a subcontractor to perform a component of such service and the subcontractor bills the customer directly, the subcontractor's receipts for the component are still subject to tax under section 1105(c)(5) as part of the entire receipt from the sale of the integrated trash removal service. Separately stating a component cost, whether as a separate line on one invoice or by splitting the charges between two or more invoices does not change the character of the underlying transaction or render the component cost charges nontaxable (Cecos Int'l, supra).

Where a customer, on the other hand, contracts directly with unrelated vendors, each of which will provide a separate service, there are, in fact, two distinct and separate transactions and taxability is determined independently for each of the separately contracted services. The service of removal (i.e., pickup and transportation) of trash from real property located within New York is subject to tax under section 1105(c)(5). A service involving only the processing of trash within New York is subject to tax under section 1105(c)(2). A service involving only the disposal of trash or waste (e.g., dumping or tipping fees at a landfill) is not by itself subject to sales or use tax.

The Tax Appeals Tribunal in General Electric Co. held however that this State's sales tax may not be imposed on the portion of the receipts attributable to the processing and disposal components of an integrated trash removal service when the processing and disposal of the trash occur outside the State of New York. The decision does not appear to focus on the true nature of the transaction and therefore the singular and exclusive situs of the taxable event for purposes of section 1105(c)(5) of the Tax Law because the application of the tax was misrepresented at argument.

The Tribunal's decision is principally based upon an analysis of whether the tax imposed under section 1105(c)(5) meets the requirement of internal consistency stated in the United States Supreme Court decision of Goldberg v. Sweet, supra, (i.e., based on a misrepresentation in the oral argument before them, the Tribunal concluded multiple taxation would occur if another state imposed a tax identical to New York's tax). As previously indicated, if another state had a sales tax statute identical to New York's, that state would not impose sales tax on the portion of a receipt attributable to the processing of the trash in that state, where such trash was removed from real property located in this State as part of an integrated trash removal service because an integrated trash removal service is subject to tax only where the real property is located. The actual meaning of the New York sales tax scheme must be inferred from the statutory language as well as the interpretation it has consistently been given by the Department and the courts. In measuring "internal consistency" one must assume both New York and Arkansas have the same law and that both situs the taxable event identically. A failure to carefully evaluate the law and facts applied can lead to an erroneous conclusion regarding internal consistency. Consequently, New York's tax on integrated trash removal services does not fail to meet the internal consistency test because such services could only be taxed in the state where the real property being serviced is located. Furthermore, since an integrated trash removal service is subject to tax as an 1105(c)(5) service and may not be treated for purposes of the Tax Law as consisting in part of an 1105(c)(2) service, another state imposing an identical tax would not, despite the Tribunal's acceptance of the taxpayers argument to the contrary, deem the portion of an integrated service occurring within its borders to be a processing service taxable under section 1105(c)(2).

Although the Tribunal stated that its holding of unconstitutionality is limited to the application of sales tax to the processing and disposal components of the particular transactions at issue in the case, the Tribunal's held that the tax imposed on trash removal services also failed the

external consistency test set forth by the United States Supreme Court. This conclusion is grounded on the absence of a statutory provision which apportions to another jurisdiction part of the receipt subject to tax under section 1105(c)(5) or provides a credit against New York sales tax for taxes paid to another jurisdiction. The Legislature could have enacted such an apportionment provision, but as the Tribunal acknowledges the Legislature did not do so. A holding that the imposition of the tax is unconstitutional in the absence of a statutory apportionment formula when a portion of a service subject to tax involves another State would amount to holding the statute to be unconstitutional per se. This would appear to exceed the authority delegated by the Legislature to the Tribunal (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988) and may be subject to judicial review in a case where this is the pivotal issue.

Accordingly, the Division of Taxation anticipates that it will be afforded an opportunity in future cases to carefully present the foregoing analysis and that the Tribunal will not consider itself bound by the inaccurate premise of its General Electric Co. decision. In the interim, the Department will continue to administer the sales tax imposed on receipts from the sale of an integrated service of trash removal as written without the qualifications and amendments proffered by the Tribunal.