



Electronic Dispatch

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COST OF HAZARDOUS WASTE DISPOSAL GOES DOWN

NY COURT OF APPEALS REVERSES LOWER COURT ON REMEDY FOR STATE'S UNCONSTITUTIONAL IMPOSITION OF DISPOSAL TAX

This Information Memo reports on the recent Court of Appeals decision (*CWM Chemical Services, L.L.C. v. Arthur J. Roth et al.*, - N.Y.3d - (March 23, 2006)), which provides relief from a disposal tax on hazardous waste disposed in New York. On the successful appeal, Bond, Schoeneck & King, PLLC (BS&K) submitted an *amicus curiae* brief on behalf of General Motors Corporation ("GM").

Background. Plaintiff-Appellant, CWM Chemical Services, L.L.C. ("CWM") challenged New York's hazardous waste disposal tax that is set forth in the New York State Environmental Conservation Law ("ECL") at Section 27-0923(2) (the "Disposal Tax") as unconstitutional under the Commerce Clause of the U.S. Constitution because it was imposed on CWM only on hazardous waste received from Out-of-State generators for disposal at the CWM hazardous waste management facility in Niagara Falls, New York ("CWM Facility").

In its Opinion and Order dated December 30, 2004, the Appellate Division concurred that the Disposal Tax unconstitutionally discriminated against interstate commerce. However, rather than simply strike down the imposition of the Disposal Tax on Out-of-State generated hazardous waste, the Appellate Division decided to extend the Disposal Tax to hazardous wastes from New York State generators by striking down existing legislative exemptions of these wastes from the tax.

CWM appealed as of right to the New York Court of Appeals. In its *amicus curiae* brief, GM underscored that the issues before the Court went well beyond the financial viability of the CWM Facility and other New York hazardous waste management facilities (also referred to as "treatment, storage and disposal facilities or "TSDFs"). GM generates hazardous waste in the course of its NYS manufacturing operations ("Process Waste") and in its cleanup of inactive waste sites in New York ("Remediation Waste"). On this appeal, GM presented the view of New York State hazardous waste generators who would be adversely impacted if the Appellate Division Decision were upheld.

Legal Issues. Under the taxation scheme set forth under ECL § 27-0923, the following two taxes (or Special Assessments) are imposed upon hazardous waste:

- (1) Tax at the point of waste generation (Generator Tax). Under ECL § 27-0923(1), the tax is assessed at a rate of \$27 per ton if the waste is designated for landfill disposal; and
- (2) Tax at the point of final treatment or disposal (Disposal Tax). Under ECL § 27-0923(2), the tax is assessed at a rate of \$27 per ton if the waste is received for landfill disposal.

Set forth in the footnote on the following page is a chart of the positions taken on the Generator Tax and the Disposal Tax by the parties on the appeal*. The reference to Pre and Post in the chart is a reference to before and after the issuance of the Appellate Division Decision.

In its brief, GM noted that by eliminating the Disposal Tax exemptions for New York State generators for both Process Waste and Remediation Waste, the Appellate Division Decision:

(a) increases the cost of doing business in New York State for manufacturers like GM, because it makes it more expensive to dispose of New York generated hazardous waste. The cost presents itself initially in the form of payment of the Disposal Tax to the extent CWM and other TSDFs are able to include the tax in their service fee. The cost is then reflected in transportation costs when a New York TSDF needs to close because it not only must still bear the burden of the Disposal Tax being imposed upon its Out-of-State customers, but must now pay the Disposal Tax for waste from its New York customers.

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[The New York State Department of Taxation & Finance decided not to wait for the outcome of the appeal to the Court of Appeals before imposing the Disposal Tax on New York generated waste. It issued a Memorandum in June 2005, concluding that the Disposal Tax be imposed on New York generated hazardous waste beginning April 1, 2005 and then sent out invoices that sought to recover from New York TSDFs the Disposal Tax for New York generated waste retroactively to the third quarter of calendar year 2002. (For the CWM Facility, the retroactive assessment meant an additional Disposal Tax of \$ 5.3 million.);

(b) adversely impacts efforts to revitalize environmentally contaminated areas known as Brownfields, despite a sweeping legislative mandate passed in 2003 that was hailed as an important economic redevelopment measure and one consistent with the Legislature’s specific exclusion of Remediation Wastes from the Disposal Tax in ECL § 27-0923; and

(c) jeopardizes the State’s ability to maintain sufficient hazardous waste management capacity within the State by threatening the financial viability of not only the CWM Facility (the only remaining commercial hazardous waste landfill facility in the State), but every TSDF operating in New York.

Court of Appeals Decision. In an opinion by Justice Susan Read, the Court concurred with CWM and GM:

The Courts below held, and the State does not contest, that State Superfund’s disposal tax, a part of the statutory financing scheme for the cleanup of inactive hazardous waste disposal sites in New York State, unlawfully discriminates against interstate commerce and thus violates the Commerce Clause of the United States Constitution. We are asked on this appeal how to cure the constitutional infirmity while remaining true to the Legislature’s intent. For the reasons that follow, we conclude that striking the disposal tax – ECL § 27-0923 (2) – in its entirety does the least damage to the overall statutory design.

The Court concluded “that striking the disposal tax in its entirety is the available option that best furthers the multiple legislative purposes of the special assessments.”

Impact. There is no longer a concern about any of the New York TSDFs having to pay the proposed retroactive assessments and therefore, there has been averted a potential follow-up claim by these TSDFs against New York generators whose wastes were previously exempt from the tax. There is currently no Disposal Tax on hazardous waste generated Out-of State or in New York. CWM will need to return to the administrative process to pursue its pending claim for recovery of past assessments found to have been unconstitutionally imposed, but bottom line - New York Generators of Process Waste and Remediation Waste dodged a bullet in avoiding the imposition of a tax that had not been previously imposed.

On the *amicus curiae* brief for BS&K were Barry R. Kogut and Kathleen M. Bennett of the firm’s Environmental Law Practice Group. If you have any questions, please feel free to contact:

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	Generator Tax (Pre)	Disposal Tax (Pre)	Generator Tax (Post)	Disposal Tax (Post)	CWM Position	Generator (GM) Position	NYS Position
Out-of-State Industrial	N/A	X	N/A	X	No Disposal Tax	No Disposal Tax	Disposal Tax
Out-of-State Remediation	N/A	X	N/A	X	No Disposal Tax	No Disposal Tax	Disposal Tax
NY Industrial	X	E	X	X	No Disposal Tax	No Disposal Tax	Disposal Tax
NY Remediation	E	E	E	X	No Generator or Disposal Tax	No Generator or Disposal Tax	Disposal Tax, but No Generator Tax

X: Assessed; E: Exempt; N/A: Not Assessed

