

Court of Appeals Strikes Hazardous Waste Disposal Special Assessment Imposed on Treatment, Storage and Disposal Facilities in New York State

In a decision dated March 23, 2006, New York State's highest court, the Court of Appeals, held that the hazardous waste disposal special assessment imposed by subdivision 2 of section 27-0923 of the Environmental Conservation Law (ECL) should be stricken in its entirety (CWM Chemical Services, LLC v. Roth¹). This memorandum explains the impact of the Court of Appeals' decision regarding the application of the special assessments on hazardous wastes imposed under section 27-0923 of the ECL.

Brief description of the law and the court decisions

Subdivision 1 of section 27-0923 of the ECL imposes a special assessment on every person who generates hazardous waste in New York State, the *generator tax*. Subdivision 2 of this section imposes a special assessment on every person in New York State who holds or is required to hold a permit to treat, store or dispose of hazardous waste, referred to as a treatment, storage and disposal facility (TSDF), the *disposal tax*. Under subdivision 2(d) of section 27-0923, the disposal tax did not apply to waste which was subject to the generator tax under subdivision 1.

As a result, hazardous waste generated in New York State and disposed of in New York State was subject only to the generator tax. However, hazardous waste generated outside of New York State and disposed of in New York State might be subject to two taxes, a generator tax in the state where the hazardous waste was generated, and New York State's disposal tax. This discriminatory treatment was found unconstitutional by New York State's courts.

The New York State Court of Appeals was asked how to cure the constitutional infirmity.

Court of Appeals decision

The Court of Appeals held that subdivision 2 of section 27-0923 should be stricken in its entirety. Therefore, a TSDF is not subject to the disposal tax on hazardous waste it receives for treatment, storage, or disposal in New York State. It does not matter whether the waste was generated within or outside New York State.

The Court of Appeals decision left the generator tax intact. Therefore, persons who generate hazardous waste in New York State continue to be subject to the generator tax.

¹CWM Chemical Services, LLC v. Roth, 2006 WL 721499, 2006 NY Slip Op. 02233 (March 23, 2006).

Refund of the hazardous waste disposal special assessment imposed on a TSDF

A TSDF that has paid the disposal tax may apply for a refund in accordance with the provisions of Article 27 of the Tax Law for all quarters that are open under the statute of limitations. To claim a refund, use Form TP-550-R, *Claim for Refund of Special Assessments on Hazardous Waste in New York State*.

A claim for refund must be filed within three years of the time the original return was filed or within two years of the time the tax was paid, whichever is later. If no return was filed, the refund claim must be filed within two years of the time the tax was paid. If the claim for refund is not filed within the three-year period but is filed within the two-year period, the amount of refund cannot exceed the portion of the tax paid during the two years immediately preceding the filing of the claim for refund.

Information

For background information concerning the generator and disposal taxes, refer to the following documents:

- TSB-M-86(1), *Special Assessments on Hazardous Waste, Chapter 38, Laws of 1985*
- TSB-M-91(1)H, *Special Assessments on Hazardous Waste Chapter 423, Laws of 1990*
- TSB-M-05(4)M, *Modification and Clarification of the Application of the Special Assessments on Hazardous Wastes*

These documents along with the forms and instructions are available by calling 1 800 972-1233, or going to the Tax Department's website, www.nystax.gov.