STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **THE PIONEER GROUP** | : | DECISION<br>DTA No. 805211 |
| 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 June 1, 1984 through May 31, 1987. | : | |

Petitioner The Pioneer Group, 500 South Salina Street, Suite 1000, Syracuse, New York 13203, filed an exception to the determination of the Administrative Law Judge issued on February 8, 1990 with respect to its petition 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 June 1, 1984 through May 31, 1987 (File No. 805211). Petitioner appeared by Charles J. Engel, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a brief in response. Petitioner's request for oral argument was denied.

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

## *ISSUE*

Whether petitioner's payments for certain snowplowing services were exempt from sales and use taxes because they were made by petitioner as an agent for the City of Buffalo Urban Renewal Agency.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "5" as indicated below.

Petitioner, The Pioneer Group, is a New York partnership that has provided real estate management services, principally the management and maintenance of office buildings and shopping malls, for approximately 15 years. According to the audit report, it is made up of three partners, Michael A. Lazar, Michael J. Falcone and Edward W. McNeil, and has approximately 40 employees. Its gross sales during the period at issue were approximately $4,500,000.00.

On November 13, 1987, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner showing tax due of $3,967.75, plus interest, for the period June 1, 1984 through May 31, 1987. Petitioner contested $3,507.52 of the $3,967.75 shown due. The contested amount consists of the sales and use taxes determined due on the purchase of snowplowing services by petitioner from Artmeier's Trucking (hereinafter "Artmeier") for the property located at Waterfront Village in Buffalo, New York. Petitioner did not contest the sales and use taxes determined due of $460.23 on its purchase of snowplowing services from a supplier named Resurface for a property located in Monroe County. Schedule G of the audit report shows the following specific purchases of snow removal services from Artmeier that were deemed subject to tax:

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| Sales tax quarter ended 2/28/85 | $ 357.50 |
| | 5,700.50 |
| | 7,453.75 |
| | 1,340.25 |
| Sales tax quarter ended 2/28/86 | 8,798.00 |
| Sales tax quarter ended 5/31/86 | 780.00 |
| | 8,356.00 |
| Sales tax quarter ended 11/30/86 | 2,100.00 |
| Sales tax quarter ended 2/28/87 | 700.00 |
| | 4,355.50 |
| | 1,673.50 |
| Sales tax quarter ended 5/31/87 | 2,229.00 |
| Total purchases from Artmeier | $43,844.00 |
| Tax due at 8% | $ 3,507.52 |

Petitioner entered into three management agreements with the Waterfront Owners Association, Inc. (hereinafter "WOA") during the period at issue that are dated January 3, 1985, January 10, 1986 and March 25, 1987, respectively. In these agreements, WOA is described as a not-for-profit corporation with its principal office at Room 1101, City Hall, Buffalo, New York. These management agreements each provided, in part, as follows:

(i) WOA is responsible, under an agreement described as the Buffalo Waterfront Retail Center Development Area Declaration and Agreement (hereinafter "Development Area Declaration and Agreement") dated January 29, 1980, executed by the City of Buffalo Urban Renewal Agency (hereinafter "BURA") and WOA, for the management and maintenance of the common areas and parking facilities of Waterfront Village, a property financed and developed by BURA;

(ii) WOA is authorized under the Development Area Declaration and Agreement to appoint a manager to fulfill its managerial and maintenance duties;

(iii) Petitioner's obligations as manager of the common areas of Waterfront Village included the soliciting of bids for and awarding a contract for snowplowing;

(iv) Petitioner was also obligated "to calculate, notify Owners of, and collect Annual Assessments..." in order to pay for common area maintenance costs;

(v) Petitioner was not entitled to a management fee[1] for its services, but was "entitled to reimburse itself from Annual Assessments for the reasonable direct costs of office supplies, telephone charges, postage and such other costs as would not have been incurred by it but for its performance of its obligations pursuant to this Agreement." Petitioner was not entitled to be reimbursed for the costs of general office overhead or the personnel engaged to perform its duties under the agreement and could not be reimbursed for any amount in excess of $500.00 except with the prior written approval of WOA.

In the agreements, WOA also delegated limited authority to petitioner to act as its agent, including: (i) the right to utilize all collection remedies available to WOA pursuant to the Development Area Declaration and Agreement provided, however, that petitioner obtained the prior written approval of WOA before initiating any collection proceeding; and (ii) "[t]o contract for and pay for all services, labor and materials reasonably necessary to operate, maintain and repair the Common Areas, provided, however,..." that petitioner obtained the prior written approval[2] of WOA before executing any contract for snowplowing or "any contract involving the expenditure of $1,000.00 or more on a single item or which is expected to require an aggregate expenditure of $1,000.00 or more over the term of the contract...."

Petitioner, as agent for WOA, entered into three snow removal contracts with Artmeier during the period at issue that are dated October 2, 1984, September 18, 1985 and September 23, 1986, respectively, for the removal of snow at the commercial property owned by WOA located at Waterfront Village in Buffalo. Artmeier did not collect sales tax from petitioner for its snow removal services. It should be noted that WOA was designated owner of the subject property and not BURA in the three snow removal contracts.

We modify finding of fact "5" to read as follows:

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[1] There is no explanation in the record concerning why petitioner agreed to manage and maintain the common areas of Waterfront Village in light of the fact that its economic remuneration for its services appears to be extremely limited under the agreements in evidence.

[2] Petitioner did not submit into evidence copies of any written approvals by WOA that were obtained prior to its executing the respective contracts with Artmeier for snowplowing.

Petitioner submitted into evidence a copy of the lengthy Development Area Declaration and Agreement previously mentioned. The main purpose of this agreement was to provide a method by which BURA, a municipal urban renewal agency created under General Municipal Law Article XV-A, could impose "mutual and beneficial restrictions, covenants...under a general plan and scheme of development and improvement for the benefit of the Property [Waterfront Village]." Section 22 of the agreement provides specifically for the transfer of control from BURA to WOA.

> "Upon the earlier of the conveyance by Deed from BURA of the last of the Parcels comprising the Property owned by it, or the recordation among the Land Records of Erie County, New York, of a notice of withdrawal and transfer, the rights, duties and obligations vested in BURA, as Declarant, shall be deemed assigned to WOA, as Declarant, and thereafter, all of such rights, duties and obligations shall be vested in WOA to the same extent as if it had originally been vested with the same."

But even prior to the transfer of control, WOA, which is described in the Development Area Declaration and Agreement as "a New York non-profit corporation formed by Declarant [BURA] for the purpose of providing non-profit, civic oriented services, as well as constituting the organization (whose membership consists of all Owners of the Commercial, Residential, Parking and Restaurant Parcels...) responsible for maintaining the Common Areas...and for representing the interests of all Persons having any interest in any portion of the Property", was responsible for the management of the property's common areas. Further, WOA was responsible for the calculation and collection of annual assessments, the amounts imposed annually on owners for the purpose of providing funds to pay common area maintenance costs.[3]

Under the Development Area Declaration and Agreement, WOA had the specific right to appoint a manager to fulfill its managerial and maintenance duties. WOA, acting pursuant to this authority, appointed petitioner to fulfill its managerial or maintenance duties as noted above.

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[3] Finding of Fact "5" of the Administrative Law Judge's determination has been modified by deleting the sentence which read as follows:

> "A review of this document shows that BURA intended to limit its activities primarily to the development phase of the Waterfront Village project."

The original finding has been modified to remove that statement which was an ultimate conclusion based upon an interpretation of the contract provisions.

***OPINION***

In the determination below, the Administrative Law Judge rejected petitioner's argument that its purchases of snow removal services were made as an agent of BURA, a tax exempt entity pursuant to Tax Law § 1116(a)(1). The Administrative Law Judge found that the record did not support petitioner's assertion that it was an agent of BURA but rather indicated that petitioner had purchased the services as an agent of WOA, which was not shown to be an exempt organization for sales tax purposes. Lastly, the Administrative Law Judge found that the terms of the Development Area Declaration and Agreement indicated that WOA was responsible for the management and maintenance of the common areas and that therefore, petitioner was fulfilling the responsibilities of WOA, not BURA, in purchasing the snow removal services.

On exception, petitioner takes issue with the Administrative Law Judge's interpretation of the terms of the Development Area Declaration and Agreement. Specifically, petitioner asserts that BURA's primary and continuing responsibility to maintain the parking facility pursuant to the Declaration Area and Development Agreement did not terminate when BURA assigned that responsibility to WOA. Accordingly, petitioner asserts BURA's tax exempt status flows through WOA, as BURA's assignee, to petitioner as WOA's subagent in its dealings with Artmeier.

In response, the Division argues that petitioner failed to meet its burden of showing that it was acting in the capacity of an agent of BURA in contracting with the snow removal service. The Division further asserts that WOA was not shown to be an agent of BURA, and that as a result, WOA had no authority to create a principal/agent relationship between BURA and petitioner. In addition, it is argued that petitioner failed to comply with the regulatory provisions requiring documentation substantiating its right to the claimed exemption. Lastly, the Division observes that the fact that the services were performed on property owned by an exempt organization does not per se exempt the services from imposition of sales tax.

We affirm the decision of the Administrative Law Judge for the reasons stated below.

Tax Law § 1116(a)(1) provides that any purchases by "the State of New York, or any of its agencies, instrumentalities, public corporations ... or political subdivisions" are exempt from sales and use tax. Pursuant to this statutory authorization, BURA, as a urban renewal agency created by General Municipal Law § 639, qualifies as a tax exempt entity.

On exception, petitioner has abandoned the argument that it was acting as a direct agent of BURA in hiring the snow removal services. Instead, petitioner now claims that even in the absence of a direct contractual relationship between it and BURA, the tax exempt status of BURA "flow[s] to WOA, and then to [petitioner] as WOA's subagent or subassignee in its dealings with Artmeier". Initially, we note that it is petitioner who bears the burden of proving its entitlement to the exemption from taxation (Matter of Colt Indus. v. New York City Dept. of Fin., 66 NY2d 466, 497 NYS2d 887, 889; Matter of Hooper Holmes v. Wetzler, 152 AD2d 871, 544 NYS2d 233, 235, lv denied 75 NY2d 706, 552 NYS2d 929). An agency is a fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act (Matter of Custom Mgt. Corp. v. New York State Tax Commn., 148 AD2d 919, 539 NYS2d 550, 551, quoting Meese v. Miller, 79 AD2d 237, 436 NYS2d 496, 499 [citation omitted]; see, Matter of Hooper Holmes v. Wetzler, supra, 544 NYS2d 233, 235). It is a relationship whereby "one retains a degree of direction and control over another" (Meese v. Miller, supra, 436 NYS2d 496, 499-500, quoting Garcia v. Herald Tribune Fresh Air Fund, 51 AD2d 897, 380 NYS2d 676, 678). The authority reposing in an agent may in some circumstances be delegated to a third party, i.e., a subagent, where there is a manifestation of consent, express or implied, from the principal for such delegation (see, 2 NY Jur 2d, Agency § 148). Where, however, the principal has not authorized the appointment of a subagent, an attempt by the agent to delegate its authority will fail (O.A. Skutt, Inc. v. J. & H. Goodwin, Ltd., 251 App Div 84, 295 NYS 772; see, 2 NY Jur 2d, Agency §§ 147, 154). Of course, one who is not an agent is precluded from appointing a subagent or from effectively delegating the duties of its nonexistent agency to a

third party (In re Zacoum's Estate, 115 NYS2d 42, 46, motion denied 283 App Div 1059, 131 NYS2d 451).

In applying these principles to the matter before us, we reject petitioner's contention that it has established an agency relationship between it and BURA and is, therefore, entitled to an exemption pursuant to Tax Law § 1116(a)(1). As an initial matter, we agree with the conclusion reached below that petitioner failed to establish that it was acting as a direct agent of BURA in contracting with Artmeier; the documents submitted by petitioner simply fail to establish the existence of any relationship whatsoever between BURA and petitioner. The documents before us, namely the three management agreements and the snowplow removal contracts, establish only that petitioner's purchase of the snow removal services as manager of the property were made as an agent of WOA. Because there is no evidence in the record that would establish that WOA qualifies as an exempt organization for sales tax purposes (see, Tax Law § 1116(a)(4); 20 NYCRR 529.7), we conclude that petitioner's status as an agent of WOA does not accord petitioner with tax exempt status.

We now turn to petitioner's argument that BURA's tax exempt status flows through to petitioner because petitioner was acting as a subagent of BURA in its dealings with Artmeier. In support of this contention, petitioner engages in an in-depth analysis of the Development Area Declaration and Agreement, arguing that a reasonable interpretation of that document establishes that BURA's activities were not limited to the development phase of the Waterfront project as found by the Administrative Law Judge. Rather, petitioner contends that under the terms of that document, BURA remained liable for the responsibilities of maintaining the parking facility. Petitioner, therefore, insists that this establishes that it was acting as a subagent of BURA in carrying out those responsibilities. We do not accept as necessary the connection between BURA's responsibility for maintenance of the parking facility and petitioner's status as a subagent. BURA could have retained responsibility for maintenance and arranged to discharge this responsibility in many ways other than establishing a principal/agent relationship with WOA and authorizing a subagent. For example, BURA could have hired WOA as an

independent contractor who in turn subcontracted the work to petitioner. Because we do not see a necessary connection between BURA's responsibilities for maintenance and petitioner's status, we do not find it necessary to determine whether BURA retained any responsibility for maintenance of the parking facility. Instead, we find petitioner simply failed to establish the principal/agent/subagent relationships required for the exemption it claims.

The Development Area Declaration and Agreement entered into between BURA and WOA provides, in pertinent part that:

> "the rights, duties and obligations vested in BURA ...shall be deemed assigned to WOA ... and thereafter all of such rights, duties and obligations shall be vested in WOA to the same extent as if it had originally been vested with the same".

Additionally, WOA is specifically declared as responsible for maintenance of the common areas, including the parking lots. This broad assignment of all rights, liabilities and obligations to WOA is clearly inconsistent with an agency relationship which, as discussed above, requires retention of some degree of direction and control over the agent by the principal (see, Matter of Custom Mgt. Corp. v. New York State Tax Commn., supra; Matter of Hooper Holmes v. Wetzler, supra). The broad language of the Development Area Declaration and Agreement directly contradicts the position now taken by petitioner, that WOA was acting solely on behalf of and subject to the control of BURA (see, Custom Mgt. Corp. v. New York State Tax Commn., supra). Petitioner's assertion to the contrary cannot now be used to vary the explicit terms of the contract in evidence before us (see, Richardson, Evidence, § 601 [Prince 10 ed]; see, e.g., Braten v. Bankers Trust Co., 60 NY2d 155, 468 NYS2d 861, 864). Accordingly, the lack of any evidence of an agency relationship between BURA and WOA effectively negates petitioner's claim that it was acting as an authorized subagent of WOA. Moreover, even assuming that the Development Area Declaration and Agreement formed a basis for an agency relationship between BURA and WOA, petitioner's claim would nonetheless fail because the documentary evidence does not indicate any manifestation of consent by BURA for delegation of that authority to a third party. Accordingly, petitioner's claim to tax exempt status based upon its status as a subagent of BURA is rejected.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, The Pioneer Group, is in all respects denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of The Pioneer Group is denied; and

4. The notice of determination and demand for payment of sales and use taxes due dated November 13, 1987 is sustained.

DATED: Troy, New York
October 4, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner