STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HENRIETTA BUILDING SUPPLIES, INC.	:	DECISION DTA NO. 822268
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 December 1, 2004 through May 31, 2007.	:	

Petitioner filed an exception to the determination of the Administrative Law Judge issued on May 27, 2010. Petitioner appeared by Harris Beach, PLLC (Michael J. Townsend, Esq., John A. Mancuso, Esq., and Robert Ryan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. 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 the Division of Taxation properly determined that petitioner, an agent of an industrial development agency, was not entitled to an exemption from sales and use taxes on certain purchases.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an

additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner, Henrietta Building Supplies, Inc. (the Company), was, at all times during the audit period, a New York corporation. The Company sold building supplies on the retail and wholesale level. During the period in issue, the Company had locations in West Henrietta, New York, Buffalo, New York, and Erie, Pennsylvania.

Petitioner was appointed an agent of the County of Monroe Industrial Development Agency (COMIDA) on December 21, 2004, December 20, 2005 and December 19, 2006. In connection with these agency appointments, COMIDA issued sales tax letters to enable petitioner, its agent, to make certain purchases exempt from sales tax. The letter dated December 21, 2004, from COMIDA to petitioner stated, among other things:

> Pursuant to a resolution duly adopted on December 21, 2004, the County of Monroe Industrial Development Agency (the "Agency") appointed Henrietta Building Supplies Inc. (the "Company") the true and lawful agent of the Agency to assist in the purchase of a 2005 Sterling boom truck, office and yard equipment (the Project) to be used in connection with the existing facility located at 1 Riverton Way, West Henrietta, New York (the "Facility").
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> * * *
>
> This appointment includes, and this letter evidences, authority to purchase on behalf of the Agency all materials to be incorporated into and made an integral part of the Facility and the following activities as they relate to any construction, erection, and completion of any buildings, whether or not any materials, equipment or supplies described below are incorporated into or become an integral part of such buildings: (i) all purchases, leases, rentals and other uses of tools, machinery and equipment in connection with construction and equipping; (ii) all purchases, rentals, uses or consumption of supplies, materials and services of every kind and description used in connection with construction and equipping; and (iii) all purchases, leases, rentals and uses of equipment, machinery and other tangible personal property (including installation costs), installed or placed in upon or under such building or facility, including all repairs and replacements of such property.

* * *

1. Appointment Letter. In exercising this agency appointment, the Company, its agents, subagents, contractors and subcontractors would give the supplier or vendor a copy of this letter to show that the Company, its agents, subagents, contractors and subcontractors are each acting as agent for the Agency. The supplier or vendor should identify the Facility on each bill or invoice and indicate thereon which of the Company, its agents, subagents, contractors and subcontractors acted as agent for the Agency in making the purchase.

A copy of this appointment letter retained by any vendor or seller may be accepted by such vendor or seller as a 'statement and additional documentary evidence of such exemption' as provided by New York Tax Law § 1132(c)(2), thereby relieving such vendor or seller from the obligation to collect sales and use tax with respect to the construction and installation and equipping of the Facility.

A letter dated February 21, 2006 to petitioner's chief financial officer from the counsel for COMIDA stated, among other things, that pursuant to a resolution, dated December 20, 2005, petitioner was appointed as an agent of COMIDA "to assist in the purchase of trucks, to include a 2006 LT9513 Sterling Boom truck (the 'Project') to be used in connection with the existing facility located at 1 Riverton Way, West Henrietta, New York (the 'Facility'). The counsel for COMIDA also sent a letter to petitioner's chief financial officer, dated January 8, 2007, stating, in part, that COMIDA adopted a resolution on December 19, 2006 appointing petitioner to be the agent of COMIDA to assist in the purchase "of two 2007 Sterling boom trucks and equipment (the 'Project') for the Company, which is located at One Riverton Way, Rochester, New York (collectively with the Project, the 'Facility').

Petitioner purchased, in Monroe County, certain equipment and materials, including 11 trucks, which are at issue in this proceeding. At the time of their purchase, petitioner claimed an exemption from sales tax on the basis that it purchased the motor vehicles as an agent of COMIDA, a tax exempt entity.

On or about June 12, 2007, the Division commenced an audit of petitioner. To the extent at issue in this matter, the Division examined petitioner's capital acquisitions for the period December 1, 2004 through May 31, 2007 and found that petitioner had purchased the 11 trucks and incurred repair expense upon which sales tax was not paid.

All of the trucks have traveled outside the jurisdictional boundaries of Monroe County and all of the trucks have interstate licensing in order to travel outside of New York. Since their purchase, seven of the trucks were garaged at the company's place of business in Monroe County. The remaining four trucks were moved to Tonawanda, New York, which is a community near Buffalo, New York. None of the trucks at issue were ever leased to another entity.

The Division considered the purchase of the trucks subject to sales and use tax because they did not remain in Monroe County. The Division also assessed tax on the expense incurred for the repair of a truck. Accordingly, the Division issued a Notice of Determination to the Company, dated March 24, 2008 (Assessment No. L-029784303-6), which assessed sales and use tax in the amount of $82,020.75, plus interest in the amount of $16,260.34 for a balance due of $98,251.09.

We make the following additional finding of fact.

> Petitioner did not submit into the record any resolution from COMIDA. The only evidence of its agency with COMIDA are the appointment letters, which are described above.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Tax Law § 1105(a) imposes sales tax upon the receipts of every retail sale of tangible personal property unless an exemption is provided. The

Administrative Law Judge observed that Tax Law § 1116(a)(1) provides an exemption for government agencies, which generally includes industrial development agencies (IDAs). The Administrative Law Judge further observed that General Municipal Law § 874(1) provides that an IDA shall not be required to pay tax on any property acquired by it or under its jurisdiction, control, supervision, or upon its activities, and that General Municipal Law § 874(2) provides that property of an IDA is exempt from taxation. The Administrative Law Judge further noted that this exemption includes private developers acting as the IDA's agent for project purposes.

The Administrative Law Judge determined that the term "project" as defined by General Municipal Law § 854(4) is broad enough, on its face, to include motor vehicles, and that the acquisition of a motor vehicle may constitute a project. However, the Administrative Law Judge found that the denial of the exemption was proper because the items were used outside of Monroe County. Based upon General Municipal Law § 854(4), the Administrative Law Judge found that when a project is partially outside of Monroe County, the agent must obtain consent from the governing bodies of all of the other municipalities where the project is located. As the record contained no evidence of consent from any other governing body, the Administrative Law Judge concluded that the Division properly denied the sales tax exemption.

The Administrative Law Judge rejected petitioner's argument that the location of where the vehicle is garaged is determinative for taxation purposes, reasoning that since no project can be used outside of Monroe County without the consent of the adjoining county, the location where the vehicle is garaged is not determinative.

The Administrative Law Judge also rejected petitioner's distinction between the terms "located" as used in General Municipal Law § 854(4) and "used" in Tax Law § 1101(b)(7). The

Administrative Law Judge noted that the Tax Law and the General Municipal Law in this area concern the same topic and should be read in *pari materia*, and found that the difference in terms is without meaning.

ARGUMENTS ON EXCEPTION

On exception, petitioner concedes that 4 of the 11 trucks are properly subject to taxation because the 4 were garaged outside of Monroe County. Regarding the remaining trucks, petitioner claims that it is entitled to the exemption because an IDA may exempt the purchase of a vehicle from sales tax as a project and that the appointment letter properly authorized petitioner to execute the project.

Petitioner argues that purchasing motor vehicles, on its own, may constitute a valid IDA project. It further states that, although the trucks left Monroe County, they were garaged within Monroe County and there is no conflict with the limiting language in General Municipal Law § 854(4). Petitioner also argues that the Division's interpretation of the New York State IDA Act is not entitled to deference because the Division lacks specialized knowledge of the General Municipal Law. Finally, petitioner argues that the exemptions should stand because they serve the public interest.[1]

The Division argues that our decision in ***Matter of Elmer W. Davis*** (Tax Appeals Tribunal, August 23, 2010) controls and requires an affirmation of the determination of the Administrative Law Judge.

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[1] We note that petitioner also cites to the determination of the Administrative Law Judge in ***Matter of Elmer W. Davis*** (Division of Tax Appeals, September 10, 1999) as precedential and in support of its position. Tax Law §2010(5) states that determinations "shall not be cited, shall not be considered as precedent nor given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state." Accordingly, we disregard petitioner's argument.

OPINION

Sales tax is imposed on the receipts from every retail sale of tangible personal property except as otherwise provided (Tax Law § 1105[a]). Tax Law § 1101(b)(5) defines "Sale, selling or purchase" as:

> Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

The record clearly establishes that each of the transactions at issue meets the definition within Tax Law § 1101(b)(5); therefore, it is incumbent upon petitioner to prove that each purchase is exempt from sales tax.

Petitioner seeks an exemption for the purchase of the subject trucks based upon an agency granted by COMIDA. Tax Law § 1116(a)(1) provides for an exemption from sales and use tax with respect to purchases or sales made by the State of New York or any of its agencies, instrumentalities, or public corporations, but only "where it is the purchaser, user or consumer or where it is a vendor of services or property of a kind not ordinarily sold by private persons." IDAs are public corporations within the meaning of this provision (***see*** 20 NYCRR 529.2[a][2]). Additionally, General Municipal Law § 874(1) provides that an IDA "shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities." This exemption includes private developers acting as the IDA's agent for project purposes (***see Matter of Fagliarone v. Tax Appeals Trib.***, 167 AD2d 767 [1990]; ***see also Pyramid Co. v. Tibbets,*** 76 NY2d 148 [1990]; ***Matter of Wegmans Food Mkts. v. Department of Taxation and Fin.***, 126 Misc2d 144 [1984], ***affd*** 115 AD2d 962 [1985], ***lv***

denied 67 NY2d 606 [1986]).

Petitioner bears the burden of demonstrating clear and unambiguous entitlement to the exemption (***see Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992]), and showing that its interpretation of the law is not only plausible, but the only reasonable construction (***see Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.,*** 83 NY2d 44 [1993]). Furthermore, statutes authorizing tax exemptions must be strictly construed against the taxpayer (***see Matter of Marriott Family Rests. v. Tax Appeals Trib.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]); however, our interpretation should "not be so narrow and literal as to defeat its settled purpose" (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 196 [1975]).

Resolving this matter requires interpreting portions of the New York State IDA Act (***see generally*** General Municipal Law Article 18-A). We note that the rules of statutory construction provide that "legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94; ***see Matter of Erie County Agric. Socy. v. Cluchey***, 40 NY2d 194 [1976]). We also note that the language of a statute should be considered in its entirety and all statutes comprising the same act should be construed together (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 97 and 98).

Article 18-A of the General Muncipial Law controls IDAs such as COMIDA. Enacted in 1969, this statute authorizes the Legislature "to create industrial development agencies with the purpose of preventing unemployment and economic deterioration in New York State" (***In re***

Main Seneca Corp v. Town of Amherst, 100 NY2d 246, 249 [2003]; General Municipal Law § 852). IDAs achieve these goals by upgrading certain types of "facilities" within their jurisdictions. This intent is memorialized within General Municipal Law § 858, which defines the purpose of an IDA as:

> to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation *facilities* . . . and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living . . . (General Municipal Law § 858, emphasis added).

As relevant herein, the powers of an IDA, including its exemption from sales tax (***see*** Tax Law § 1116; General Municipal Law §§ 854, 874), flow to a designated agent when the agent acts pursuant to valid project purposes within the IDA jurisdiction (***see Matter of Wegmans Food Mkts.***, ***supra***; ***Matter of Fagliarone***, ***supra***).

COMIDA appointed petitioner as its agent for the project of assisting in purchasing equipment, including the trucks at issue, to be used at the facility designated as petitioner's address in West Henrietta, New York. The record reveals that the entirety of the purported IDA project was the acquisition of assets to be used in petitioner's business. The appointment letter does not indicate how the equipment was to be used. The record is silent as to whether the trucks were actually used at the designated facility apart from their being garaged there. The question then becomes whether the exemption granted for the purchase of equipment can be construed as a valid project under Article 18-A of the General Municipal Law where the only evidence of project use is garaging.

Petitioner argues that, under the language of General Municipal Law § 854(4), the mere

acquisition of tangible personal property may be considered a project if the recipient and the garage for the equipment is located within the IDA jurisdiction. We note that we have previously addressed this argument under factually similar cases in ***Matter of Elmer W. Davis*** (***supra***) and ***Matter of Upstate Roofing*** (Tax Appeals Tribunal, January 13, 2011). In these cases, we held that a taxpayer must not only show the appointment and acquisition of tangible personal property, but also prove that such property was used in connection with the designated facility. Moreover, in ***Matter of Conking and Calabrese*** (Tax Appeals Tribunal, January 13, 2011), we specifically held that the mere acquisition of a boom truck was not a project.

General Municipal Law § 854(4) defines an IDA project as:

> any land, any building or other improvement, and all real and personal properties located within the state of New York and within or partially within and partially outside the municipality for whose benefit the agency was created, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, civic, commercial or industrial purposes or other economically sound purposes . . . .

The Courts clarified the definition of a project in ***Matter of Wegmans Food Mkts.*** (***supra***), which stands for the proposition that the expansive definition of a project may include the purchase of tangible personal property if such property is installed or used upon a facility or within a project.[2]

The language of General Municipal Law § 854(4) is broad enough to encompass the acquisition of tangible personal property, such as a motor vehicle, if the vehicle has been shown by evidence to have been used for the purpose intended and within the statutory parameters (***see***

[2] We also note that ***Matter of Wegmans Food Mkts., supra***, may be distinguished from the instant matter because the IDA there actually owned the tangible personal property that the Division sought to tax.

Matter of Elmer W. Davis, ***supra***). Contrary to petitioner's assertions, we find that entitlement to this IDA-granted exemption requires showing more than the mere appointment letter and acquisition of equipment, but also that the equipment was installed or used upon a facility or within a project (***see Matter of Wegmans Food Mkts.***, ***supra***; ***Matter of Elmer W. Davis***, ***supra***). We conclude that neither the designation of an acquisition as a project by an IDA, nor the characteristics of the equipment is dispositive of whether the equipment was installed or used upon a facility pursuant to a valid project.

We hold that, to qualify for the exemption on the trucks, petitioner must show that the equipment was actually installed into or used upon a facility or project (***see Matter of Elmer W. Davis***, ***supra***). We find the instant matter factually indistinguishable from ***Matter of Elmer W. Davis*** (***supra***) and ***Matter of Upstate Roofing*** (***supra***). Unlike ***Matter of Wegmans Food Mkts.*** (***supra***), the record does not contain any evidence as to how the trucks were used other than their garaging at the facility. Garaging is clearly not equipping or any other industrial development activity contemplated by Article 18-A of the General Municipal Law. Accordingly, we conclude that the purchases of the trucks are properly subject to tax because petitioner failed to prove that purchased trucks bore any other connection to the facility.

We find additional grounds to deny the exemption because petitioner used the trucks outside of Monroe County without consent of the other jurisdictions (***see Elmer W. Davis***, ***supra***; ***Matter of Upstate Roofing***, ***supra***). General Municipal Law § 854(4) limits the ability of IDAs as follows:

> no agency shall provide financial assistance in respect of any project partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other

> municipalities in which any part of the project is, or is to be, located. Where a project is located partially within and partially outside the municipality for whose benefit the agency was created, the portion of the project outside the municipality must be contiguous with the portion of the project inside the municipality.

Petitioner did not show how the use of the trucks outside of Monroe County related to work on the COMIDA project at issue. The record is silent as to whether petitioner obtained consents from any other governing body where the equipment was used. Petitioner could have offered evidence to prove that it had properly used the trucks on a project outside of Monroe County upon showing consent of the "governing body or bodies of all the other municipalities" in which the project property was used. As petitioner failed to carry its burden, we must find that the trucks were used on other projects while absent from Monroe County and, therefore, required consent of the jurisdictions located outside of Monroe County. Accordingly, petitioner's purchases were properly subject to tax because the projects lacked the consent required by General Municipal Law § 854(4).

We find no merit in petitioner's argument that the exemption must stand because Monroe County would be the only taxing jurisdiction affected. For this argument, petitioner relies upon ***Matter of Xerox v. State Tax Commn.*** (71 AD2d 177 [1979]), which teaches that the imposition of county use taxes, established pursuant to Tax Law §§ 1110 and 1210, requires more than a transient presence within the county. This matter is easily distinguished because it involves an exemption from New York State sales tax under Tax Law § 1105, whereas ***Matter of Xerox*** (***supra***) involved the application of county use tax. Accordingly, petitioner's argument on this point is rejected.

We have considered petitioner's remaining arguments, including the assertion that the

Division's interpretation lacks specialized knowledge regarding the grant of sales tax exemptions, and find these arguments to be either without merit or rendered moot by the foregoing discussion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Henrietta Building Supplies, Inc. is denied;

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

3. The petition of Henrietta Building Supplies, Inc. is denied; and

4. The Notice of Determination dated March 24, 2008, is sustained.

DATED:Troy, New York
April 21, 2011

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

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

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