

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
DURANT ASSOCIATES, LLC. : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NOS. 822444
Use Taxes under Articles 28 and 29 of the Tax Law for the : AND 822445
Periods June 1, 2005 through August 31, 2005 and :
December 1, 2006 through November 30, 2007. :
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Petitioner, Durant Associates, LLC, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2005 through August 31, 2005 and December 1, 2006 through November 30, 2007.

On February 17, 2009 and February 26, 2009, respectively, petitioner, by Harris Beach, PLLC (Michael J. Townsend, Esq., and Marybeth Frantz, Esq., of counsel), and the Division of Taxation, by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by July 1, 2009, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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

The parties entered into a Stipulation of Facts, with attached exhibits. The Stipulation of Facts and attached exhibits form the basis of the Finding of Facts herein.

1. Petitioner, Durant Associates, LLC, (the Company), was, at all times during the audit period, a New York limited liability company.

2. The company was appointed an agent of the County of Monroe Industrial Development Agency (COMIDA) on December 20, 2005 and again on February 20, 2007. In connection with this agency appointment, COMIDA issued a sales tax letter to enable petitioner, its agent, to make certain purchases exempt from sales tax. Petitioner then purchased, in Monroe County, certain equipment and materials, including a hydraulic crane, a boom lift and a service vehicle.

3. On occasion, the hydraulic crane, boom lift and service vehicle (items in question) left the jurisdictional boundaries of Monroe County. During the audit period, the service vehicle was garaged at petitioner's place of business in Monroe County. The other items of equipment were stored at petitioner's place of business in Monroe County.

4. The Division of Taxation (Division) conducted an audit of petitioner for the period June 1, 2005 through August 31, 2005 and December 1, 2006 through November 30, 2007.

5. The Division issued a Notice of Determination, dated January 28, 2008 (Assessment No. L-029641966-5), which assessed sales and use tax in the amount of \$5,204.46, plus interest in the amount of \$720.29, less payments or credits in the amount of \$4,993.73, for a balance due of \$931.02. The amount of tax assessed was based on two items: \$2,496.31 was assessed on construction equipment purchased under the COMIDA exemption because the items were used outside of the jurisdictional boundaries of Monroe County and \$2,207.15 was assessed on

purchases made prior to the grant of the COMIDA exemption. The tax assessed on equipment purchased prior to the COMIDA exemption is not at issue.

6. The Division issued a second Notice of Determination, dated January 28, 2008 (Assessment No. L-029640198), which assessed sales and use tax in the amount of \$1,547.92, plus interest in the amount of \$95.39, for a balance due of \$1,643.31. The assessment was premised upon the Division's position that the COMIDA exemption does not apply to the purchase of a vehicle.

7. The Division determined that the Company was entitled to a refund on expense purchases in the amount of \$4,784.77, and this amount was applied to the tax due on fixed asset purchases.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner maintains that as a properly appointed agent of COMIDA, it was entitled to purchase the vehicles in question exempt from sales tax, and the jurisdiction where the vehicles are garaged controls the sales tax rate.

9. The Division argues that the mobility of a motor vehicle for which the agency seeks sales tax exemption, particularly one which can be and is used out of the subject jurisdiction, extends it beyond the borders of the county where the tangible personal property is used as an integral part of a project, thereby disqualifying it for exemption from sales tax. The Division further maintains that the location where the vehicles are garaged or located does not control the tax exemption.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax upon the receipts of every retail sale of tangible personal property except as otherwise provided. Thus, unless the hydraulic crane, boom lift, service vehicle and truck are exempt from tax, sales and use tax was properly imposed on these purchases.

B. Section 1116 (a)(1) of the Tax Law provides an exemption from state taxes of governmental agencies which would usually include an IDA. This section provides, in pertinent part, as follows:

[A]ny sale . . . by or to any of the following or any use . . . by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The State of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions 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 . . .* (Emphasis added.)

C. In this instance, the Division assessed deficiencies of sales and use tax on two occasions for different reasons. Before addressing the particular assessments, it is helpful to consider the legal setting in which these cases arise. The leading case on the matter in issue is *Matter of Wegman's Food Mkts. v. New York State Dept. of Taxation & Finance* (126 Misc 2d 144, *affd* 115 AD2d 962, *lv denied* 67 NY2d 606 [1986]) (*Wegman's I*). In *Wegman's I* the Court was presented with the issue of whether tangible personal property made for the purpose of installing or using the property for projects financed by industrial development bonds are exempt from sales and use tax. The Court began by noting that pursuant to article-18 of the General Municipal Law, industrial development bonds are issued by local industrial development agencies. The proceeds of these bonds are used to provide the funding for projects.

The Court then observed that article 18-A reveals a design of creating tax exemptions upon property which the IDA owns, as well as upon property it controls and supervises and upon the property's activities. In order to guarantee that the IDA's will be treated as governmental agencies, the Court noted that an IDA is defined as a "corporate governmental agency, constituting a public benefit corporation." (General Municipal Law § 856[2].) This concept of an IDA as a governmental agency is reinforced by General Municipal Law § 874(1) which states that IDA's perform a "public purpose" and that they "shall be regarded as performing a governmental function in the exercise of the powers conferred . . . and shall be required to pay no taxes or assessments upon any of the proper[ties] acquired by [them] or under [their] jurisdiction or control or supervision or upon [their] activities." General Municipal Law § 874(2) further provides, among other things, that the property of the agency is exempt from taxation.

The Court pointed out that the term "projects" as set forth in General Municipal Law § 854 was made all-embracing and concluded that personal property was included in the tax exemption. In reaching this conclusion, the Court noted "[t]he legislative reason is apparent. Such property is as much a part of the project developed by the IDA as real estate and buildings." According to the Court, the legislative intent was to allow an exemption as long as "the IDA owned, controlled or supervised it in connection with its activities, including the equipping and furnishing of a project." (*Wegman's I*, 126 Misc 2d at 150). This intent is displayed in General Municipal Law § 858 (10) which permits the IDA "[t]o acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects."

D. The first issue to be addressed is whether the COMIDA exemption applies to petitioner's purchase of motor vehicles. Initially, it is noted that the property in this matter is quite different from the property involved in *Wegmans I* insofar as the property herein will not

be installed in projects financed by the IDA. Nevertheless, the fact that the property is different does not mean that the property does not qualify for an exemption.

E. The term “project” is defined by General Municipal Law § 854(former [4]) as follows:¹

“Project” shall mean 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 identified and called for to implement a state designated urban cultural park management plan as provided in title G of the parks, recreation and historic preservation law and which may include or mean an industrial pollution control facility, recreation facility, educational or cultural facility, a horse racing facility, a railroad facility, a continuing care retirement community, a civic facility, provided, however, that, of agencies governed by this article, only agencies created for the benefit of a county and the agency created for the benefit of the city of New York shall provide financial assistance in any respect to a continuing care retirement community, and provided, however, 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 within and partially outside the municipality for who 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. Provided further, that no agency shall provide financial assistance for any project where the project applicant has any agreement to subsequently contract with a municipality for the lease or purchase of such project or project facility.

F. In construing the statute, “[t]he 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 . . .” (McKinney’s Cons Laws of NY, Book 1, Statutes § 94). On its face, the definition of a project as set forth in General Municipal Law § 854(former [4]) is clearly broad

¹ The definition of the term project in General Municipal Law § 854(former [4]) was repealed effective January 31, 2008. The discussion herein is based on the definition of “project” which was in effect at the times relevant to this matter.

enough to include a truck. The definition of a project includes equipment deemed necessary or desirable for which the agency was created. The term “equipment,” in turn, is defined in Webster’s Ninth New Collegiate Dictionary (9th ed 2007), in part, as follows: “1a: the set of articles or physical resources serving to equip a person or thing: as (1) the implements used in an operation or activity: apparatus (2): all the fixed assets other than land and buildings of a business enterprise. . . .” It is clear from the forgoing definition that motor vehicles are included in the definition of the term equipment as used in General Municipal Law § 854(former [4]) and that the acquisition of a motor vehicle may constitute a project.

G. The Division argues that since motor vehicles may be driven anywhere, they are not an integral part of a COMIDA project that must be located in Monroe County. There is no basis in the statute for this position. Rather, given the express language of the statute, the equipment, need only be deemed necessary, desirable or incidental to property which may or may not be in existence. The Division contends that motor vehicles are treated differently. This may be correct with respect to other issues. However, given the absence of authority for this position, it is concluded that the Division improperly denied an exemption to the motor vehicle solely on the basis that it was a motor vehicle.

H. In view of the foregoing, petitioner’s argument regarding whether the Division’s position represents a change in policy is academic and will not be addressed.

I. A different analysis is required with respect to the denial of the exemption because the items were used outside of Monroe County. As set forth above, General Municipal Law § 854 (former [4]) states, in part, that:

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 within and partially outside the municipality for whose benefit the agency was created, the portion of the project outside the municipality must be must be contiguous with the portion of the project inside the municipality.

Here, there is no evidence that petitioner obtained the consent of any other governing body where the items were used. Nor did petitioner present any evidence to show that this requirement is inapplicable. Under these circumstances, it is concluded that the Division properly denied the sales tax exemption on those items which were used outside of Monroe County.

J. In reaching the forgoing conclusion, it is noted that petitioner's reliance upon *Matter of Xerox v. State Tax Commn.* (71 AD2d 177, 422 NYS2d 493 [1979]) is misplaced. That matter did not involve the statutory requirements imposed by General Municipal Law § 854(former [4]) and is therefore inapposite. It is clear from the language of General Municipal Law § 854(former [4]) that the location of where the vehicle is garaged is not determinative of the incidence of taxation. As argued by the Division, since no project can be used outside of Monroe County without the consent of an adjoining county, the location where a vehicle is garaged or located is not determinative.

K. Petitioner argues that the Division's reasoning is flawed because it equates the term "located" in Tax Law § 854(former [4]) with the term "used" in Tax Law § 1101(b)(7). According to petitioner, the term "located" implies a more permanent removal than the term "used." As set forth in the Division's brief, there is no authority for petitioner's position. Since the Tax Law and the General Municipal Law in this area concern the same topic and should be read in pari materia. The term "use" in Tax Law § 1101(b)(7) is defined as the exercise of any right or power over tangible personal property. If a piece of equipment is item is located in a

particular jurisdiction, it has, as a practical matter, been used in that jurisdiction. In this context, the difference in terms, is without meaning and rejected.

L. On the submission, petitioner offered a copy of a legislative bill jacket as an exhibit. The bill jacket has been included in the file of this matter as part of petitioner's brief. However, it has not been marked as an exhibit because it is not probative of a fact in issue and is not regarded as evidentiary in nature.

M. The petitions of Durant Associates, LLC are granted to the extent of Conclusion of Law G and the Division is directed to cancel the Notice of Determination dated January 28, 2008; the petitions are, in all other respects, denied, and the remaining Notice of Determination, dated January 28, 2008, is sustained together with such interest as may be lawfully due.

DATED: Troy, New York
December 23, 2009

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE