

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
: **OM P. POPLI, P.E., L.S., P.C.** : DETERMINATION
: DTA NOS. 822622
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods December 1, 2004 through February 28, 2005 and :
December 1, 2005 through February 28, 2006. :

Petitioner, Om P. Popli, P.E., L.S., P.C., filed a 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 periods December 1, 2004 through February 28, 2005 and December 1, 2005 through February 28, 2006.

On May 1, 2009 and May 18, 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. (Sarah Dasenbrock, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by September 28, 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, Om Popli, P.E., L.S., P.C., was, at all times during the audit period, a New York professional corporation.

2. Petitioner was appointed an agent of the County of Monroe Industrial Development Agency (COMIDA) on May 20, 2003 and again on November 16, 2004. 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 November 16, 2004, from COMIDA to petitioner stated, among other things:

Pursuant to a resolution duly adopted on November 16, 2004, the County of Monroe Industrial Development Agency (the "Agency") appointed Popli Consulting Engineers & Surveyors (the "Company") the true and lawful agent of the Agency to assist in the purchase of equipment, including work vans, surveying and computer equipment, and office furnishings, (the Project) to be used in connection with the existing facility located at 555 Penbrooke Drive, Penfield, New York (the "Facility").

* * *

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.

3. Petitioner purchased, in Monroe County, certain equipment and materials, including three vehicles, which are at issue in this proceeding. At the time of their purchase, petitioner claimed an exemption from sales tax on the basis that petitioner purchased the motor vehicles as an agent of COMIDA, a tax exempt entity. Since their purchase, the three vehicles have been garaged at petitioner's place of business in Monroe County. However, they have been driven outside of Monroe County in the course of certain jobs.

4. On or about November 28, 2007, the Division commenced a field audit of petitioner. To the extent at issue in this matter, the Division concluded that the vehicles were subject to tax because they were taken out of Monroe County for various jobs.

5. The Division issued a Notice of Determination, dated October 9, 2008 (Assessment No. L-030658355-5), which assessed sales and use tax in the amount of \$5,413.84, plus interest in the amount of \$1,814.12, for a balance due of \$7,227.96.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner maintains that as a properly appointed agent of COMIDA, it was entitled to purchase the vehicles in question exempt from sales tax. Petitioner notes that the Division has not pointed to any authority which prevents motor vehicles from qualifying as project property.

It further submits that the jurisdiction where the vehicles are garaged controls the sales tax rate and asserts that, since an industrial development agency (IDA) has the statutory authority to exempt purchases of tangible personal property that by their nature are moveable, it is illogical that actual travel outside of an IDA's jurisdiction would result in their being subject to sales and use tax.

According to petitioner, the Division's position that the intermittent travel of the vehicles outside of Monroe County causes them to be subject to tax is contrary to the meaning of the statutory language. Petitioner explains that the Division reached this conclusion because it has erroneously interpreted the word "located" in General Municipal Law § 854(4) to mean "used" rather than being situated with a greater sense of permanence. Petitioner further contends that this position is contrary to the legislative intent.

Petitioner next argues that the Division's position is a departure from past precedent insofar as it did not begin assessing sales tax on vehicles or other items of rolling stock based solely on the definition of "project" until 2006. However, the relevant definition of "project" became effective in 1993 leaving 13 years in which the Division did not contest or raise an issue with respect to IDA exemptions for rolling stock.

In its brief, petitioner maintains that the Division's interpretation of the General Municipal Law is not entitled to any deference because the Division does not have any specialized knowledge in this area of the law. Lastly, petitioner posits that the Division's interpretation of the General Municipal Law should be overruled because it is contrary to the public interest.

7. The Division argues that the grant of an exemption from sales tax is restricted and that COMIDA may not offer financial assistance for a project in the form of a sales tax exemption with respect to property that is intended to be used outside of Monroe County without the prior

consent of every jurisdiction in which the property is used and that jurisdiction must be contiguous with Monroe County. The Division next argues that motor vehicles are not subject to the exemption because COMIDA lacks the statutory authority to grant sales tax exemptions for purchases that do not become part of the project because they can and will be used outside of Monroe County. According to the Division, its position in this matter is not a recent interpretation or a change in policy. The Division's brief concludes with the arguments that petitioner must prove its entitlement to an exemption and that the public interest is served by a uniform application of the Tax Law, which the Division has done.

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 motor vehicles are exempt from tax, sales and use tax was properly imposed on these purchases.

B. An exemption for governmental agencies, which would usually include an IDA, is set forth in section 1116 (a)(1) of the Tax Law. 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.)

In addition to the foregoing, General Municipal Law § 874(1) provides that an industrial development agency “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.” General Municipal Law § 874(2) further provides that the property of the agency is exempt from taxation.

This exemption includes private developers acting as the IDA's agent for purposes of the project (see *Matter of Wegmans'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]).

C. Article 18-A of the General Municipal Law reveals a design of creating tax exemptions upon property owned by an IDA as well as upon property it "controls" or "supervises" or upon "its activities" General Municipal Law § 874 [1]; *Matter of Wegmans*). The purpose of industrial development agencies is set forth in General Municipal Law § 858 which states, in part, as follows:

The purpose of the agency shall be 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 the recreation opportunities, prosperity and standard of living

D. IDA's provide assistance in order to assist in the completion of "projects" which are defined, in part, 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. . . .

On its face, the definition of a project as set forth in General Municipal Law § 854(former [4]) is clearly broad enough to include motor vehicles. The definition of a project includes equipment deemed necessary or desirable for which the agency was created. The term

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.

“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 foregoing 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.

E. 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.

F. A different analysis is required with respect to the denial of the exemption because the items were used outside of Monroe County. 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 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.

G. In reaching the foregoing 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.

H. Petitioner argues that the Division's reasoning is flawed because it equates the term "located" in General Municipal 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 or 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. In addition, petitioner's proposed construction of General Municipal Law § 854(former [4]) would be contrary to the well settled maxim that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal*, 167 AD2d 767, 563 NYS2d 324 [3d Dept 1990]).

I. 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.

J. The petition of Om Popli, P.E., L.S., P.C. is denied and the Notice of Determination, dated October 9, 2008 is sustained together with such interest as may be lawfully due.

DATED: Troy, New York
March 18, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE