

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AMERICAN FRUIT &amp; VEGETABLE COMPANY, INC.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 822631</b>
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 June 1, 2005 through August 31, 2005 and March 1, 2006 through May 31, 2006.	:	

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Petitioner, American Fruit & Vegetable Company, Inc., 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 June 1, 2005 through August 31, 2005, and March 1, 2006 through May 31, 2006.

On April 2, 2009 and April 13, 2009, respectively, petitioner, by Harris Beach, PLLC (Marybeth E. Frantz, Esq., of counsel), and the Division of Taxation, by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by October 9, 2009, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly determined that petitioner, as an agent of an industrial development agency, was not entitled to an exemption from sales and use taxes on two delivery trucks.

***FINDINGS OF FACT***

The parties stipulated to facts which have been incorporated into the following Findings of Fact:

1. American Fruit & Vegetable Company, Inc. (petitioner), a wholesale distributor of fresh fruits, vegetables, herbs, salad dressings, juices and nuts throughout western New York State, is, and at all times during the audit period was, a New York corporation.

2. Petitioner was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on June 21, 2005 and a second time on March 21, 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. Petitioner then purchased, in Monroe County, certain equipment, comprised of two delivery trucks.

3. The delivery trucks were regularly used to make deliveries of fruit and vegetables in Monroe County and were occasionally used to make such deliveries in counties other than Monroe County.

4. The Division of Taxation (Division) conducted an audit of petitioner for the period March 1, 2004 through February 28, 2007. Capital acquisitions made using the COMIDA exemption were reviewed in detail.

5. The Division asserts that sales tax is due in the amount of \$8,225.31, plus interest, and issued a Notice of Determination dated August 25, 2008 to petitioner asserting tax in that amount

on the purchase of such delivery trucks based upon the Division's position that the COMIDA exemption does not apply to these purchases.

6. The Division's field audit report stated in pertinent part:

The review of Capital-COMIDA records determined that additional taxable purchases of \$102,816.38 were discovered, resulting in additional tax due of \$8,225.31 (see Schedule E2 on page C-5b). The basis of tax due is vehicles purchased with an invalid COMIDA exemption (see page C-10A for Vehicle invoices). Taxpayer makes deliveries of fruits and vegetables all across Western NY and the vehicles do not stay strictly within the County of Monroe.

***SUMMARY OF THE PARTIES' POSITIONS***

7. 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.

Petitioner further argues that no other jurisdiction could be considered affected by the exemption granted to petitioner, thus, COMIDA was not required to obtain any other jurisdiction's consent to the financial assistance provided to petitioner.

Petitioner asserts that since the Division has no specialized knowledge of the General Municipal Law (GML) its interpretation need not be followed.

Lastly, from a public policy perspective, petitioner argues that the Division's interpretation of the GML provisions would significantly limit the ability of the IDAs to provide a critical tax exemption to new or expanding businesses such as petitioner's.

8. 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 asserts this position is well established.

The Division further maintains that COMIDA may not offer financial assistance for an IDA project in the form of a sales tax exemption for the purchase of a vehicle which is used outside of COMIDA's jurisdiction without prior consent to such use by the other jurisdictions, which as not been obtained.

The Division also asserts that the location where the vehicles are garaged or located does not control entitlement to the tax exemption.

The Division rejects petitioner's assertion that it has no specialized knowledge concerning exemptions from tax.

#### ***CONCLUSIONS OF LAW***

A. Sales tax is imposed upon the receipts of every retail sale of tangible personal property except as otherwise provided (Tax Law § 1105[a]). Therefore, unless the delivery trucks are exempt from tax, sales and use tax was properly imposed upon such purchases.

B. It is well settled that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (*see Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal*, 167 AD2d 767, 563 NYS2d 324 [3d Dept 1990]).

C. Tax Law § 1116 (a)(1) provides an exemption from sales and use taxes with respect to purchases or sales made by the State of New York, or any of its agencies, instrumentalities, or public corporations. Industrial development agencies (IDAs), such as COMIDA, are public corporations within the meaning of this provision (*see* 20 NYCRR 529.2[a][2]) and this exemption has been interpreted as extending to an agent of the industrial development authority

for the purposes of a particular project (*see Matter of Wegmans Food Mkts.v. New York State Dept. of Taxation and Finance*, 126 Misc 2d 144, 481 NYS2d 298 [1984], *affd* 115 AD2d 962, 497 NYS2d 790 [1985], *lv denied* 67 NY2d 606, 501 NYS2d 1025 [1986]). In carrying out the activities of COMIDA, an IDA agent is able to acquire materials and equipment free from sales tax in connection with a project, as that term is defined by GML § 854. COMIDA appointed petitioner as its agent and in the context of a project, petitioner purchased two delivery trucks. The Division does not dispute the proper appointment of petitioner as agent of COMIDA, but rather maintains that since a motor vehicle registered by New York State for over the road use can legally be driven anywhere, it does not become a part of the project realty in Monroe County or an integral part of the project.

D. GML § 858 defines the purposes of industrial development agencies, in relevant part, as follows:

[T]o 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 . . . .

E. IDAs provide financial assistance, which includes sales tax exemptions (*see* GML § 854[14]), in furtherance of the completion of “projects,” as defined, in relevant part, by GML § 854(former [4]) as follows:<sup>1</sup>

“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,

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<sup>1</sup> The definition of the term project in GML § 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.

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.

A project under this provision of the GML may involve personal property, including that which is acquired in connection with qualified land, buildings or other improvements.

Accordingly, the acquisition of equipment alone can constitute a project. Whether the acquisition of the delivery trucks was a project, or the delivery trucks were acquired in conjunction with a project, the next determination is whether the project is located within the municipality for whose benefit the industrial development agency was created, i.e., in this case, Monroe County. If the project, or the trucks acquired incident to the project, were located even partially outside Monroe County, COMIDA could be limited as to its issuance of financial assistance, such as bond proceeds and exemptions from taxation, unless it obtains prior consent from the governing bodies of all the other municipalities where the project is located (GML § 854[4], [17]). The parties differ in their opinion as to whether the location of where the trucks are used is also where the project is located for exemption purposes.

F. The Division bases its exemption denial on the mere fact that the subject of the exemption, delivery trucks with on-road usage, have mobility which makes them capable of travel outside the jurisdictional boundaries of the IDA, whether or not this actually occurred. This argument is rejected. There is no support for the conclusion that the mere mobility of the trucks should result in a failure to qualify for the exemption. The fact that they *could* be used outside Monroe county does not disqualify petitioner for the exemption. Thus, the Division's denial of the exemption on the sole basis of the mobility of the trucks was in error. However, the discussion in this case must address whether the denial was proper given actual usage outside Monroe county.

In this case petitioner has conceded that it used the delivery trucks outside Monroe county to make the same deliveries of its products as it did within the county boundaries. However, petitioner argues that such use outside the county does not rise to the level of permanent use which might subject an item to taxation in another jurisdiction. Petitioner maintains that the trucks have always been located and used, in a more permanent sense, in Monroe county for purposes of assessing sales and use tax since they were never purchased, garaged, stored or permanently removed for use outside Monroe county. Petitioner relies in part on the holding in *Matter of Xerox v. State Tax Commn.* (71 AD2d 177, 422 NYS 2d 493 [1979]) to support its argument that the sales tax on vehicles is controlled by the jurisdiction in which they are garaged. In that matter, the issue was strictly a tax matter, without the additional considerations imposed upon industrial development agencies, such as COMIDA, pursuant to the GML. Further, the sales and use tax issue did not concern the purchase of the subject aircraft, but rather the rental of the hanger facilities where the aircraft was stored, regularly serviced and maintained. The Court found the location of the hangar to dictate the applicable rate of tax and noted the exception to this rule would arise if essentially all the use of the vehicle occurred in another jurisdiction. The facts of Xerox are not at all similar, and the provisions of the law applicable in that case do not apply to the issues presented herein.

In this case petitioner used the trucks for the same business deliveries inside and outside the county of Monroe, as it served western New York. COMIDA defined the project as the purchase of a truck or trucks to be used in a certain manner. Thus, the specified use of the trucks was the project and the location of that use must necessarily be the location of the project. Although there might be a circumstance where the temporary nature of vehicle activity outside Monroe county would be viewed as something less than that which took place within the county, that circumstance

clearly does not exist here. The same types of deliveries, the same purpose of the project, took place within Monroe county, as well as outside the county. As previously stated, in order for COMIDA to offer financial assistance or tax exemptions, if the project is located even partially outside Monroe county, it was necessary for COMIDA to obtain prior consent from the governing bodies of all the other municipalities where the project is located (GML former § 854[4], [17]). There is no assertion or evidence that petitioner obtained the consent of any other governing body. Nor did petitioner present a viable argument as to why this requirement would not apply. Accordingly, it is concluded that the Division properly denied the sales tax exemption on the trucks which, as conceded by petitioner, had a presence both within and without Monroe County.

G. Petitioner maintains that the Division has no specialized knowledge of the GML, thus its interpretation need not be followed. This argument has no merit. In the big picture, this matter addresses an exemption from sales and use tax about which the Division has the requisite knowledge. As to the provisions of the GML which are part of this discussion, rules of statutory construction are applied, and the statutory language must be construed according to its natural and most obvious sense (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the language of a statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183, 470 NYS2d 791 [1983]). The language of General Municipal Law § 854 (former[4]), on which this case ultimately turns, is clear and unambiguous. The Division has the capability to conclude that the statute can and should be read literally, in support of its proper denial of the exemption.

H. Lastly, petitioner argues that the Division's interpretation of the GML would not further the public policy goals of IDAs and would limit their ability to provide tax exemptions to new or expanding businesses. Given the statutory background of GML § 858, which delineates the

purposes and powers of an IDA, the purchase of delivery trucks by petitioner was consistent with the goal of assisting a commercial facility, thereby creating job opportunities for the welfare of the people of the State of New York. The fact that certain parameters exist to counter any abuses of the benefits, does not run afoul of the public policies which are served, and the Division's conclusion does not fail on this basis.

I. The petition of American Fruit & Vegetable Company, Inc. is denied and the Notice of Determination dated August 25, 2008, is hereby sustained.

DATED: Troy, New York  
April 8, 2010

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE