

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

:

of

:

MIDTOWN TIRE, INC.

:

DETERMINATION
DTA NO. 822708

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, 2006 through November 30, 2006. :

Petitioner, Midtown Tire, 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 period June 1, 2006 through November 30, 2006.

On April 23, 2009 and April 30, 2009, respectively, petitioner, appearing by Harris Beach PLLC (Marybeth E. Frantz, Esq., of counsel), and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Michael J. Hall, of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by August 26, 2009, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, as an appointed agent of the Monroe County Industrial Development Agency (COMIDA), was entitled to an exemption from sales and use taxes on its purchase of five trucks during the quarters ended August 31, 2006 and November 30, 2006 (the audit period).

FINDINGS OF FACT

The parties entered into a stipulation of facts, executed by petitioner on April 23, 2009 and the Division of Taxation on April 30, 2009, comprised of seven numbered paragraphs, all of which have been incorporated into the facts below.

1. Midtown Tire, Inc. (Midtown), a New York corporation during the periods in issue, was appointed an agent of COMIDA on April 18, 2006.

2. In connection with the agency appointment, COMIDA issued a letter, dated April 18, 2006, which provided that the appointment was to assist Midtown in its purchase of six trucks for the existing facility located at 171 York Street, Rochester, New York. The letter stated, in part, as follows:

Pursuant to a resolution duly adopted on April 18, 2006, the County of Monroe Industrial Development Agency (the "Agency") appointed Midtown Tire, Inc. (the "Company") the true and lawful agent of the Agency to assist in the purchase of six (6) trucks, to include a Mitsubishi 18' box truck, a GMC 3/4 ton truck and 4 Chevrolet 1/2 ton pickup trucks (the "project") for the existing facility at 171 York Street, Rochester, 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.

In fact, Midtown purchased, in Monroe County, five trucks, on which it paid no sales and use taxes based upon petitioner's agency relationship with COMIDA.

3. Petitioner purchased the following five vehicles:

- a. 2007 GMC Sierra 1500 (purchased 10/4/2006)
- b. 2007 GMC Sierra 1500 (purchased 10/4/2006)
- c. 2006 Mitsubishi 18' Van FE108 (purchased 6/14/2006)
- d. 2006 Mitsubishi FE180 (purchased 10/20/2006)
- e. 2006 Mitsubishi FE180 (purchased 11/20/2006)¹

4. Petitioner conceded that all five trucks, which were registered and licensed by the New York State Department of Motor Vehicles, have been used in counties other than Monroe. One of the trucks was permanently removed from Monroe County. As a result, petitioner does not dispute the tax and minimal interest assessed on this truck, but continues to protest the penalty asserted by the Division of Taxation. The four remaining trucks were garaged at petitioner's place of business at 171 York Street, Rochester, Monroe County, at all times since their purchase, including during the audit period.

¹It is noted that petitioner did not buy six trucks, and at least three of those purchased were not the ones specified in the COMIDA letter.

5. The Division of Taxation conducted a detailed audit of petitioner's sales, capital assets, expense purchases and capital COMIDA records for the audit period June 1, 2004 through May 31, 2007, which resulted in additional tax of \$18,760.18, plus penalty and interest. Petitioner agreed to the sales and expense portions of the audit results but disagreed with the portion related to the purchase of the five trucks, since it believed it was entitled to an exemption by virtue of its agency position with COMIDA.

6. The Division issued to petitioner a Statement of Proposed Audit Change for the period June 1, 2004 through May 31, 2007 which set forth additional sales and use tax due of \$6,981.86 plus penalty and interest. The tax represented tax on the purchase of the five trucks in the quarters ended August 31, 2006 and November 30, 2006.

7. The Division of Taxation issued to petitioner a Notice of Determination, L-030937545-2, dated November 11, 2008, which asserted additional sales and use tax due of \$6,981.86 plus penalty and interest. On or about April 13, 2009, petitioner paid part of the tax asserted on the Notice of Determination in the sum of \$1,723.36, representing tax and interest due on the truck which was permanently removed from Monroe County. Petitioner continues to dispute the sales and use tax and interest asserted on the purchases of the other four trucks and the penalty asserted on all five truck 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. It contends that, since the sales tax was properly payable in the county where the trucks were garaged or primarily used, COMIDA was able to exempt the vehicles from tax without affecting any jurisdiction other than the one in

which the vehicles were primarily operated, i.e., Monroe County (citing *Matter of Xerox v. State Tax Commission*, 71 AD2d 177, 422 NYS2d 493, [1979]).

9. The Division argues that the mobility of the motor vehicles for which petitioner seeks a sales tax exemption, which petitioner concedes are used outside of Monroe County, disqualifies them for the exemption from sales tax provided for under its agency relationship with COMIDA and consistent with Tax Law § 1116(a)(1). The Division also contends that the location where the vehicles are garaged or located has no impact on its conclusion that this “project” or vehicle purchase was not eligible for the tax exemption, since they were clearly located partially outside of the municipality for whose benefit COMIDA was created.

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. Therefore, unless the trucks 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

C. In *Matter of Wegmans’s Food Markets v. Department of Taxation & Finance of the State of New York* (126 Misc 2d 144 [1984], *affd* 115 AD2d 962 [1985], *lv denied* 67 NY2d 606

[1986]), the Court articulated that Article 18-A of the General Municipal Law contains throughout its provisions the purpose of establishing tax exemptions upon property owned by an IDA as well as upon property it “controls” or “supervises” and upon “its activities” (General Municipal Law §874[1]). According to the Court, the beneficial purpose of the legislation and the legislative intent are clearly expressed in General Municipal Law § 852, which states:

It is hereby declared to be the policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop recreation, economically sound commerce and industry and economically sound projects . . . for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such industrial development agencies the rights and powers provided in this article. . . .

The use of all such rights and powers is a public purpose essential to the public interest, and for which public funds may be expended.

In further support of its conclusion that the Legislature intended IDAs to be treated as governmental agencies, the Court looked to General Municipal Law § 858, which delineates the purposes and powers of an IDA, 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 their recreation opportunities, prosperity and standard of living

Given this statutory background, the purchase of vehicles 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. Although not addressed by either party, it is within this framework that it is concluded that the purchase of the trucks in issue falls within the purview of the term “project,” as that term is defined in the General Municipal Law.

D. The term “project” is defined by General Municipal Law § 854(former [4]) as follows:²

“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, a recreation facility, educational or cultural facility, a horse racing facility, a railroad facility, a life care 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 life care 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 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. 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.

On its face, the definition of a project as set forth in General Municipal Law § 854(former [4]) is broad enough to include a truck, since the definition includes equipment deemed necessary or desirable “in connection therewith” or “incidental thereto.” Although the phrases “in connection therewith” and “incidental thereto” appear to refer to land, a building or some other improvement, for purposes of this determination it is assumed, as it was by the parties, that the

² 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.

definition of a project as set forth in General Municipal Law § 854(former [4]) is broad enough to include a truck.

E. However, the Division's argument that motor vehicles, which may be driven anywhere, cannot be an integral part of a COMIDA project required to be located within Monroe County, is without authority. There is no provision in the statute for this position, which only requires that the equipment be deemed necessary, desirable or incidental to land, a building or some other improvement which may or may not be currently in existence. Given the absence of authority for its position, it is concluded that the Division improperly denied the sales tax exemption for the trucks on the sole basis that they were motor vehicles that have the potential to leave the jurisdiction of the IDA.

F. Statutes creating exemptions from tax are to be strictly construed (*see Matter of Grace v. New York State Tax Commn* , 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn*, 99 AD2d 867, 472 NYS2d 744 [1984], *affd* 64 NY2d 682, 485 NYS2d 526 [1984]). In addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (*see Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1988]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (*see McKinney's Cons Laws of NY*, Book 1, Statutes § 92).

Statutory rules of construction provide that "[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, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts

must follow the plain meaning of its words, and “there is no occasion for examination into extrinsic evidence to discover legislative intent . . .” (McKinney’s Cons Laws of NY, Book 1, Statutes § 120; *see Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 667 NYS2d 327 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the 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]).

G. The language of General Municipal Law § 854 (former[4]) is clear and unambiguous and therefore can and should be read literally, where it 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 partially 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.

It was established that the project was partially in other jurisdictions (i.e., outside the municipality for whose benefit COMIDA was created) and that there was no evidence that prior consent had been obtained from any other governing body where the project was located, or that the requirement that prior consent be obtained is inapplicable in these circumstances. Therefore, 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.

H. The petition of Midtown Tire, Inc. is denied and the Notice of Determination, dated November 11, 2008, is sustained.

DATED: Troy, New York
February 18, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE