STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN FOOD AND VENDING CORPORATION	:	
	:	DETERMINATION
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period December 1, 2006 through August 31, 2009.	:	DTA NO. 825300
	:	

Petitioner, American Food and Vending Corporation, 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 December 1, 2006 through August 31, 2009.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals in Albany, New York, on October 30, 2013 at 10:30 A.M., with all briefs due by March 4, 2014, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bond, Schoeneck & King, PLLC (Jonathan B. Fellows, Esq., and Courtney A. Wellar, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUE

Whether petitioner's purchases of vending equipment, used in locations other than the empire zone in which petitioner is certified, qualify for the tax exemption provided for in Tax Law former § 1115(z)(1).

FINDINGS OF FACT

1. Petitioner, American Food and Vending Corporation (AFVC), is a New York corporation whose principal place of business from December 1, 2006 through August 31, 2009 (audit period) was located at 3606 John Glenn Boulevard, Syracuse, New York. AFVC provided vending machine and cafeteria services to businesses, industry and schools.

2. On August 23, 2003, AFVC was designated an eligible Empire Zone Enterprise at its facility on John Glenn Boulevard in Syracuse, New York,[1] and received a sales tax certification from the Department of Taxation and Finance on December 8, 2003, granting it approval to receive sales and use tax exemptions on purchases of certain property to be used or consumed within the Empire Zone in which petitioner was certified.

3. As part of its application to become a Qualified Empire Zone Enterprise (QEZE), petitioner committed to creating new jobs and investing in its facility on John Glenn Boulevard. In fact, it added a new roof, built office space and paved roads. In addition, it added numerous full and part-time jobs.

4. The John Glenn location consisted of approximately 15,000 square feet, half of which was used for administrative offices and the remainder used for storage of food products, vending machines and equipment and the repair and refurbishing of machines.

5. During the audit period, AFVC was a properly certified QEZE. It operated in 14 different states, with the John Glenn location serving as its headquarters.

6. AFVC solicited accounts from businesses, industry and schools to install vending machines on their premises. The tax in dispute was not paid on vending equipment that was

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[1]The certificate also listed a second location in the same empire zone, 124 Metropolitan Park Drive, Syracuse, New York, which petitioner acquired after the audit period herein.

purchased by petitioner from out-of-state suppliers and delivered to the John Glenn location, where it was stored, prepped and then deployed to customer locations in Upstate New York outside of petitioner's Onondaga County empire zone. During the audit period, the vending machines were purchased from Crane National Vendors located in St. Louis, Missouri, and the coin mechanisms and bill validators were purchased from MEI, a company located in Philadelphia, Pennsylvania.

7. The vending equipment required various levels of preparation before it was deployed. The crated machines arrived by truck on pallets and, when ready for deployment, were unpacked, inspected for damage and tested. Part of the testing protocol involved installation of the coin mechanism and the bill validator, which were programmed and checked to assure proper operation. In addition, shelving was matched to the configuration used by AFVC, sometimes necessitating replacement with the proper type and number. The machines were loaded with specific food products prior to placement. This entire process took about two and a half hours.

8. On average, a new machine received at the John Glenn facility was placed in inventory for 30 to 45 days before deployment to a customer location. Until deployment was scheduled, the machines remained in storage in their original packing, i.e., crate, wrapping and pallet. When ready for deployment, AFVC employees removed the machines from inventory, prepared them as described above, and placed them on AFVC's delivery truck for shipment to customer locations, where AFVC employees installed them.

9. The products sold in the vending machines were warehoused at the John Glenn facility and were stocked in the trucks by drivers employed by AFVC before they left work for the day. The next morning, the drivers drove the trucks from the facility to customer locations where they

stocked and then retrieved cash from the vending machines. The cash was then returned to the accounting department at the John Glenn facility.

10. When a vending machine broke down at a customer location, an occurrence that happened infrequently, service was provided by maintenance staff from the John Glenn facility. If the machine could not be repaired on location, it was brought back to the John Glenn facility for service and a replacement machine was provided.

11. If an account was lost, vending machines were retrieved by AFVC employees and returned to the John Glenn facility.

12. Once installed at a customer location, a vending machine usually remained there for the remainder of its useful life, unless it needed repairs that could not be performed at the customer's location or the account was closed. In such cases, the vending machines were refurbished or upgraded by AFVC employees with the intent of redeploying them at another customer location.

13. During the audit period, AFVC had between 2,000 and 2,500 machines deployed in the greater Syracuse, New York, area, each with an average useful life of 10 to 15 years.

14. Although it was the general practice of AFVC to order new machines when it needed them, it did not operate a just-in-time inventory because of the possibility that an account might need an additional machine or a replacement due to repairs. Further, when vending machine manufacturers offered AFVC a discount on machines, it sometimes purchased extras to capitalize on the savings. However, generally, the goal was to deploy new machines within 30 to 45 days, not house them in inventory.

15. The Division of Taxation (Division) performed a field audit of petitioner between September 18, 2009 and May 5, 2011. On May 20, 2011, the Division issued a Notice of

Determination to petitioner asserting additional sales and use taxes due of $132,961.50 plus interest for the audit period. Although the audit examined and found additional tax due in the areas of sales, capital expenditures, expense purchases based on test records and expense purchases based on missing invoices, the only additional tax asserted by the Division that remains in dispute concerns the tax that was not paid on the purchase of vending equipment, the amount of which was stipulated by the parties to be $66,699.00.

CONCLUSIONS OF LAW

A. Tax Law § 1110 imposes a compensating use tax on every person for the use within the state of any tangible personal property purchased at retail (***see also*** 20 NYCRR 531.1[a]). Tax Law § 1101(b)(7) defines the term "use" as the "exercise of any right or power over tangible personal property. . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time" (***see also*** 20 NYCRR 526.9).

B. Purchase at retail is defined in Tax Law § 1101(b)(1) as "[a] purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision." In turn, Tax Law § 1101(b)(4)(i) defines a retail sale as a sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use in performing services subject to tax under Tax Law § 1105(c).

From these sections, it is apparent that petitioner's purchases of vending equipment were purchases at retail since they were not for resale or covered under the exclusions for services listed in Tax Law § 1105(c). Thus, the purchases of the vending equipment were subject to tax under Tax Law § 1110.

C. Although petitioner agrees that the purchases of vending equipment were subject to tax, it believes that it qualifies for the exemption provided for in Tax Law former § 1115(z)(1),[2] based upon its certificate of eligibility to participate in the Empire Zones Program and its designation as a QEZE by the New York State Department of Taxation and Finance, the latter bestowing sales and use tax exemptions "on purchases of certain property and services to be used or consumed within empire zones in which [petitioner was] certified to receive benefits under Article 18-B of the General Municipal Law."

Thus, with the issuance of the QEZE sales tax certification on December 8, 2003, effective January 1, 2004, petitioner was on notice that the exemptions it received were restricted to property that was to be used or consumed in the Onondaga County empire zone, consistent with Tax Law former § 1115(z)(1), which provided:

> Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, receipts from every sale of services described in subdivisions (b) and (c) of such section eleven hundred five and consideration given or contracted to be given for, or for the use of, such tangible personal property or services shall be exempt from the taxes imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise, provided that (i) such property or property upon which such a service has been performed or such service (other than a service described in subdivision (b) of section eleven hundred five) is directly and predominantly, or such a service described in clause (A) or (D) of paragraph one of such subdivision (b) of section eleven hundred five is directly and exclusively, used or consumed by such enterprise in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law with respect to which such enterprise is certified pursuant to such article eighteen-B, or (ii) such a service described in clause (B) or (C) of paragraph one of such subdivision (b) of section eleven hundred five is delivered and billed to such enterprise at an address in such empire zone; provided, further, that, in order for a motor vehicle, as defined in subdivision (c) of section eleven hundred seventeen of this article, or tangible personal property related to such a motor vehicle to be found to be used predominantly in such a zone, at least fifty percent of such motor vehicle's use shall be exclusively within such zone or at least fifty percent of

[2]Tax Law former § 1115(z) was repealed by Laws of 2009 (ch 57, pt S-1, § 30), effective September 1, 2009.

> such motor vehicle's use shall be in activities origination or termination in such zone, or both; and either or both such usages shall be computed either on the basis of mileage or hours of use, at the discretion of such enterprise. For purposes of this subdivision, tangible personal property related to such a motor vehicle shall include a battery, diesel motor fuel, an engine, engine components, motor fuel, a muffler, tires and similar tangible personal property used in or on such a motor vehicle.

The salient portion of the statutory section notes that consideration given for the use of tangible personal property shall be exempt from use tax where the property is sold to a qualified empire zone enterprise, "*provided that . . . such property . . . is directly and predominantly . . . used or consumed by such enterprise in an area designated as an empire zone . . . with respect to which such enterprise is certified . . .* (emphasis added)."

D. Tax Law § 1101(b)(7) defines the term "use," in part, as follows:

> The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. . . .

The Sales and Use Tax Regulations (20 NYCRR 526.9[b]) define some of the terms used in Tax Law § 1101(b)(7):

> (1) *Receive* is to obtain or gain possession of tangible personal property for any purpose whatsoever by means of purchase.
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> (2) *Storage, keeping or retention* for any length of time is to hold tangible personal property for any purpose whatsoever by the purchaser.
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> (3) *Withdrawal from storage* is to remove from storage any tangible personal property which was so stored for any purpose whatsoever.
>
> (4) *Installation of tangible personal property* is to install such property by any means for any purpose whatsoever.

> (5) *Affixation of tangible personal property to real or personal property* is the attachment of such property to other property by any means for any purpose whatsoever.
>
> (6) *Any consumption of tangible personal property* is to consume such property by any means for any purpose whatsoever.

Reading the words of Tax Law former § 1115(z)(1) in light of the definitions provided in Tax Law § 1101(b)(7) and the regulations thereunder, it must be concluded that the vending equipment was used predominantly and directly at customer locations outside of the empire zone in which petitioner was certified.

While petitioner established that there was some use of the vending equipment within the empire zone, specifically those uses cited in 20 NYCRR 526.9(b)(1), (2) and (3), and the two and one half hours of final preparation prior to deployment, the direct and predominant use of the equipment occurred at the customer locations, where the equipment was employed to store and dispense food products and collect revenue. This use was continuous for the useful life of the equipment, which was typically 10 to 15 years, with the possibility of brief interruptions for service, which was concededly rare. Thus, since the direct and predominant use did not take place in the empire zone where petitioner was certified, petitioner was not eligible for the exemption provided for in Tax Law former § 1115(z)(1).

E. Statutes creating exemptions from tax are to be strictly construed (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn.***, 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [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 [1998]; ***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 [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 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (***Matter of Automatique, Inc. v. Bouchard***, 97 AD2d 183 [1983]).

The words of Tax Law former § 1115(z) are clear and in need of no further interpretation beyond their ordinary, everyday meaning. The term "predominantly" is defined by Webster's Ninth New Collegiate Dictionary 927 (Merriam-Webster Inc. 1990) as "mainly" or "for the most part." Generally, words of ordinary import are to be given their ordinary and usual meaning. (Mckinney's Cons laws of NY, Book 1, Statutes § 232.) In addition, predominantly is generally defined to mean over fifty percent (***see e.g.*** 20 NYCRR 528.13[c][4] [a regulation promulgated pursuant to Tax Law § 1115(a)(12), which focused on use of equipment directly and predominantly in the production of tangible personal property]). Therefore, since it is

determined that petitioner's vending equipment was used predominantly outside of its empire zone, petitioner has not met its burden of showing clear and unambiguous entitlement to the exemption (***Matter of Marriott Family Rests. v. Tax Appeals Tribunal***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]; ***Matter of W.T. Wang, Inc. v. State Tax Commn.***, 113 AD2d 189 [1985] [wherein it was held that the taxpayer bears the burden of demonstrating clear and unambiguous entitlement to the exemption claimed]).

F. There is no question that petitioner has met and exceeded the eligibility requirements for the Empire Zones Program and earned its QEZE sales tax certification. Further, there is no dispute that its operations and employment of hundreds of persons in New York State is inextricably linked with its purchase and deployment of vending equipment. However, these laudable accomplishments do not serve to automatically bestow a sales tax exemption for the vending equipment, the requirements for which are plainly set forth in Tax Law former § 1115(z)(1).

G. The petition of American Food and Vending Corporation is denied and the Notice of Determination, dated May 20, 2011, is sustained.

DATED: Albany, New York
September 4, 2014

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