STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 825300
AMERICAN FOOD AND VENDING CORPORATION	:	
for Revision of a Determination or 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.	:	

Petitioner, American Food and Vending Corporation, filed an exception to the determination of the Administrative Law Judge issued on September 4, 2014. 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).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a brief in reply. Oral argument was heard in Albany, New York on February 5, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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

We find the facts as determined by the Administrative Law Judge, except for finding of fact 2, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

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 a qualified empire zone enterprise (QEZE) at its facility on John Glenn Boulevard in Syracuse, New York.[1] AFVC received a QEZE 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 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 Boulevard 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 Boulevard location serving as its headquarters.

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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.

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 purchased by petitioner from out-of-state suppliers and delivered to the John Glenn Boulevard 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 Boulevard 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 Boulevard 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 Boulevard 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 Boulevard facility. If the machine could not be repaired on location, it was brought back to the John Glenn Boulevard 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 Boulevard 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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Following a review of the relevant statute and established principles of statutory construction, the Administrative Law Judge determined that petitioner's purchases of vending equipment were not entitled to the QEZE sales and use tax exemption under Tax Law former § 1115 (z) (1) because petitioner's predominant use of such equipment occurred at customer locations outside of the Onondaga County empire zone.

ARGUMENTS ON EXCEPTION

Petitioner contends that the predominant use of the vending equipment occurred within the empire zone at its John Glenn Boulevard facility. In addition to its use of the equipment at its facility, petitioner asserts that its use of the equipment through its employees at customer locations (e.g., restocking, retrieving cash) should be deemed a use within the zone, as such use is "inextricably tied" to its facility. Petitioner seeks to distinguish between such uses of the vending equipment and its customers' use of the equipment at customer locations.

Petitioner asserts that its construction of the statute and a finding in its favor herein are consistent with the economic development purposes underlying the enactment of the QEZE program.

In support of its construction of Tax Law former § 1115 (z) (1), petitioner cites an administrative law judge determination and State Senate and Assembly bills that sought to amend the subject exemption by "codifying" that determination (***see*** 2014 NY Senate-Assembly Bill S7382, A10059). The Assembly and Senate bills would have amended Tax Law former § 1115 (z) (1) by adding a definition of "directly and predominantly" for purposes of that provision. Such a change would have favored petitioner's position in the present matter. Petitioner notes that the Senate version of the bill (S7382) was passed in both the Assembly and Senate during the 2014 legislative session, but was not enacted into law. The bill would have applied the changes therein retroactively to 2001.

The Division asserts that the Administrative Law Judge correctly determined that the predominant use of the vending equipment occurred outside petitioner's empire zone. The Division also contends that petitioner may not cite an administrative law judge determination in support of its position because such determinations are nonprecedential. The Division further argues that the existence of bills attempting to amend Tax Law former § 1115 (z) (1) supports its position that the law, as written, precludes the claimed exemption.

OPINION

We affirm the determination of the Administrative Law Judge.

Petitioner seeks an exemption from sales tax pursuant to Tax Law former § 1115 (z) (1).[2] Exemption statutes are properly construed against the taxpayer (***Matter of Federal Deposit Ins.***

[2] This provision was repealed effective September 1, 2009 (***see*** L 2009, ch 57).

Corp. v Commissioner of Taxation & Fin., 83 NY2d 44, 49 [1993]). Petitioners bear the "burden of demonstrating clear and unambiguous entitlement" to the exemption (***Matter of Marriott Family Rests. v Tax Appeals Trib. of State of N.Y.***, 174 AD2d 805, 807 [1991], ***lv denied*** 78 NY2d 863 [1991], citing ***W.T. Wang, Inc. v State of New York Tax Commn., Dept. of Taxation & Fin.***, 113 AD2d 189, 191 [1985]). Indeed, petitioners must show that their interpretation of the law is "not only plausible, but that it is the only reasonable construction" (***Matter of Moran Towing and Transp. Co. v New York State Tax Commn.***, 72 NY2d 166, 173 [1988]). Nevertheless, construction of an exemption statute should not be so narrow as to defeat the exemption's settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

The statute at issue, Tax Law former § 1115 (z) (1), provided for an exemption from tax under Article 28,[3] in relevant part, as follows:

> "Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article . . . and consideration given or contracted to be given for, or for the use of, such tangible personal property . . . shall be exempt from the taxes imposed by this article where such tangible personal property . . . [is] sold to a qualified empire zone enterprise, *provided that (i) such property . . . is directly and predominantly . . . 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* . . . " (emphasis added).

As applied to the present matter, the text of Tax Law former § 1115 (z) (1) requires that petitioner establish that it directly and predominantly used the subject vending equipment in the Onondaga County empire zone in order to qualify for the exemption.

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[3] The exemption under former § 1115 (z) (1) generally did not apply to the local portion of sales tax imposed under Article 29 (***see*** Tax Law former § 1115 [z] [3]).

Upon review of the record, we agree with the Administrative Law Judge's finding that petitioner's predominant use of the vending equipment occurred while such equipment was deployed at customer locations outside of petitioner's Onondaga County empire zone. We thus conclude that petitioner has failed to establish "clear and unambiguous entitlement" to the claimed exemption (***Matter of Marriott Family Rest.***).

Specifically, we note that, for sales tax purposes, use is defined broadly as "the exercise of any right or power over tangible personal property" (Tax Law § 1101 [b] [7]). This definition plainly encompasses petitioner's deployment of the vending machines to customer locations where, as stated by the Administrative Law Judge, it was used "to store and dispense food products and collect revenue." We reject petitioner's assertion that the use of the equipment at customer locations was a use by customers and not petitioner. Petitioner purchased vending machines for the purpose of deploying them to customer locations to generate revenue. Such a deployment of assets to achieve a particular purpose is the very definition of use.

Additionally, although not defined in Tax Law former § 1115 (z), the Division has defined predominantly for purposes of the QEZE sales tax exemption as "50% or more" (***see*** NY St Dept of Taxation & Fin Technical Memorandum TSB-M-02[5]S [2002] ["Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29)"]).[4] This definition is in accord with the common meaning of that word (***see*** Random House Webster's College Dictionary 1026 [1997]; ***see also Matter of Automatique v Bouchard***, 97 AD2d 183, 186 [1983]) [where a statute does not define a term it is appropriate to interpret it in its ordinary everyday sense]). Similarly, predominantly is consistently defined as greater than 50% in the Division's sales tax regulations

[4] The Division's technical memoranda are "advisory in nature" and "do not have legal force or effect" (20 NYCRR 2375.6 [c]).

(***see*** 20 NYCRR 528.7 [d] [1], 528.11 [c] [2], 528.13 [c] [4]). The Division's "50% or more" definition of predominantly as provided in the technical memorandum is thus reasonable.

Applying such definition to the facts herein shows that petitioner's predominant use of the vending equipment occurred while such equipment was deployed at customer locations outside of petitioner's Onondaga County empire zone. Once installed, a vending machine usually remained at a customer location for the entirety of its useful life, a period of 10 to 15 years (***see*** Findings of Fact 12 and 13). In contrast, the vending equipment was present (and used) at petitioner's John Glenn Boulevard facility for about 45 days prior to deployment to a customer location (***see*** Finding of Fact 8). There is no evidence that any of the subject vending machines were ever returned to the John Glenn Boulevard facility from a customer location as a result of a lost account (***see*** Finding of Fact 11). There is also no evidence that any of the vending machines at issue required repairs, either on site or at the John Glenn Boulevard facility, an infrequent occurrence in petitioner's business (***see*** Finding of Fact 10). The record thus shows that the vending machines at issue were used by petitioner for the vast majority of time, i.e., predominantly, while the machines were at customer locations outside petitioner's Onondaga County empire zone.

On this last point, we note our rejection of petitioner's argument that restocking and removing cash from the machines by its employees should be considered a use within the Onondaga County empire zone. Petitioner's proposed interpretation is inconsistent with the statutory language which, as discussed, requires that the predominant use of the property occur within the QEZE's designated empire zone; not, as petitioner proposes, that such predominant use have a "tie" to the designated zone.

Our interpretation of Tax Law former § 1115 (z) (1) herein is premised on the plain meaning of the words used in the statute. In our view, such language is unambiguous. Accordingly, it is inappropriate to "go elsewhere" to "restrict or extend" its meaning (***Matter of Erie County Agric. Socy. v Cluchey***, 40 NY2d 194, 200 [1976]). As the "statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]), we conclude that our interpretation is consistent with the legislative intent underlying the exemption.

Petitioner asserts, however, that this interpretation is contrary to the intent of the Legislature in enacting the QEZE program. In support, petitioner cites General Municipal Law § 956, part of the New York State empire zones act, as follows:

> "It is the public policy of the state to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within these economically impoverished areas and to do so without encouraging the relocation of business investment from other areas of the state."

Petitioner argues that its use of the subject vending equipment meets the legislative intent underlying the QEZE program because such use was directly connected to jobs that it created within the Onondaga County empire zone. Petitioner thus asserts that the QEZE sales tax exemption should be allowed.

We disagree. While, as the Administrative Law Judge noted, petitioner's "employment of hundreds of persons in New York State is inextricably linked with its purchase and deployment of vending equipment," we are constrained to follow the statutory language of Tax Law former § 1115 (z) (1). Petitioner's construction of that provision renders meaningless the requirement that the property be used or consumed in the empire zone in which the QEZE is certified. "We cannot, under long settled principles of statutory interpretation, essentially rewrite an

unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear (citations omitted)" (***Matter of Golub Corp. v New York State Tax Appeals Trib.***, 116 AD3d 1261, 1263 [2014]).

We are unpersuaded by petitioner's argument that the Senate and Assembly bills that would have amended Tax Law former § 1115 (z) (1) support its interpretation of that statute in the present matter. First, we note that S7382, the Senate version of the bill that passed in the Assembly and Senate, contains no express language indicating that its purpose was to clarify the then-existing exemption. Additionally, we note that S7382 was vetoed by the Governor on December 17, 2014, and thus not enacted into law (***see*** Legislative Information - Legislative Bill Drafting Commission, http://public.leginfo.state.ny.us).[5] The Governor's veto message states that S7382 "expands the . . . exemption in [Tax Law former § 1115 (z)] by weakening the requirement that property be directly and predominantly used by a [QEZE] in an Empire Zone to qualify for the exemption" (Governor's Veto Message No. 567 [2014]). The veto message further states that, "[i]f enacted, this legislation would expand the application of this repealed tax provision" (***id***.). The Governor's veto message may be considered indicative of legislative intent (***see Four Maple Dr. Realty Corp. v Abrams***, 2 AD2d 753, 754 [1956], ***appeal dismissed*** 2 NY2d 837 [1957], ***appeal dismissed*** 355 US 14 [1957] ["In exercising his power to approve or veto legislation, the Governor performs a legislative function."]). We concur in the construction of S7382 as set forth in the veto message and find, therefore, that the bill would have substantively changed the exemption. Accordingly, we conclude that vetoed bill S7382 does not

[5] We take official notice of S7382 and the veto message pertaining to that bill as a matter of public record (***see Affronti v Crosson***, 95 NY2d 713, 720 [2001], ***cert denied*** 534 US 826 [2001]; State Administrative Procedure Act § 306 [4]).

reflect the intent of the Legislature with respect to Tax Law former § 1115 (z) (1) as in effect during the period at issue.

Petitioner's reliance on an administrative law judge determination as precedent in support of its position herein is inappropriate. Tax Law § 2010 (5) provides that such determinations "shall not be cited, shall not be considered as precedent nor given any force or effect in any other proceedings conducted pursuant to the division [of tax appeals] or in any judicial proceedings conducted . . . in this state." Accordingly, we have not considered or given any effect to the determination cited by petitioner in reaching our decision herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of American Food and Vending Corporation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of American Food and Vending Corporation is denied; and

4. The notice of determination dated May 20, 2011 is sustained.

DATED: Albany, New York
July 30, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner