

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ELMER W. DAVIS, INC.</b>	:	DECISION
		DTA NO. 822119
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 September 1, 2005 through August 31, 2006.	:	

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Petitioner, Elmer W. Davis, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 10, 2009. Petitioner appeared by Harris Beach, PLLC (Shawn M. Griffin and Michael J. Townsend, Esqs., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument, at petitioner's request, was held on February 24, 2010 in Troy, New York.

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

***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 certain purchases.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “2” and “3,” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

Elmer W. Davis, Inc. (petitioner), a roofing contractor, is, and at all times during the audit period was, a New York corporation.

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

In connection with an agency appointment, on June 21, 2005, the County of Monroe Industrial Park Agency (“COMIDA”) issued a sales tax letter to enable petitioner, as its agent, to make certain purchases exempt from sales tax. This letter stated, *inter alia*, that COMIDA appointed petitioner as its lawful agent “to assist in the renovation and equipping (the “Project”) of the existing facility at 1217 Clifford Avenue, Rochester, New York” (Exhibit “F”).<sup>1</sup> Petitioner then purchased, in Monroe County, certain equipment and materials described below.

The “Facility” consists of the purchase of two (2) asphalt tankers, one (1) stationary yard tanker, one (1) truck, one (1) forklift, predator spray equipment, one (1) compressor, computer equipment, telephone upgrades, a security system and the renovation and expansion of office space and a parking lot to accommodate continued growth (the “Project”) at the existing facility located at 1217 Clifford Avenue, Rochester, New York (the “Facility”) (Addendum “A” to Exhibit “F”).<sup>2</sup>

We modify finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

The trucks, equipment and other items described above (sometimes, *infra*, “trucks” or “trucks and rolling stock”) were frequently used on jobs outside the

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<sup>1</sup> We note that 1217 Clifford Avenue, Rochester, NY is the business address of Elmer W. Davis, Inc.

<sup>2</sup> We modified this fact to more accurately reflect the record.

jurisdictional boundaries of Monroe County, but were garaged at petitioner's principal place of business in Monroe County.<sup>3</sup>

The Division of Taxation (Division) conducted an audit of petitioner for the period June 1, 2003 through August 31, 2006; however the transactions in issue occurred between September 1, 2005 and August 1, 2006.

The Division asserts that New York State and Monroe County sales tax is due in the amount of \$19,244.24, plus interest, and issued a Notice of Determination dated December 26, 2009 to petitioner asserting tax in that amount, plus interest.

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

Vehicles that are for use exclusively on COMIDA property (ie, forklifts) can be exempted. Motor vehicles that have the opportunity to leave COMIDA jurisdiction (Monroe County) are beyond the power of COMIDA to exempt. The motor vehicles in question on this audit are driven off COMIDA property and utilized at various job sites in other jurisdictions. When asked, the taxpayer was unable to provide any documentation that showed the vehicles were used exclusively on COMIDA property and, in fact, orally agreed with the auditors [*sic*] observation that since jobs were *frequently* located outside of Monroe County the vehicles in question had left COMIDA jurisdiction. The use of these vehicles outside Monroe county is the basis of the States [*sic*] position that COMIDA did not have the authority to exempt them and they are taxable (emphasis added).

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted the undisputed fact that COMIDA is a public benefit corporation established under General Municipal Law Article 18-A and, generally, is exempt from sales and use tax pursuant to General Municipal Law § 874, in conjunction with Tax Law § 1116. In carrying out the activities of COMIDA, an industrial development agency ("IDA") agent is able to acquire materials and equipment free from sales tax in connection with a project, as that term is defined by General Municipal Law § 854. It was undisputed that COMIDA

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<sup>3</sup> We modified this fact to more accurately reflect the record.

properly appointed petitioner as its agent. Petitioner purchased motor vehicles and other moveable equipment pursuant to such agency appointment. However, the Division maintained that motor vehicles registered and licensed for over the road use do not become a part of the project realty in Monroe County or an integral part of the project.

The Administrative Law Judge noted that a project under General Municipal Law § 854 may involve personal property, including that which is acquired in connection with qualified land, buildings or other improvements. Accordingly, she found that the acquisition of equipment alone can constitute a project. The Administrative Law Judge noted further that if the project, or the vehicles acquired incidental to the project, were located even partially outside Monroe County, COMIDA must obtain prior consent from the governing bodies of all the other municipalities where the project is located (*see*, General Municipal Law § 854[4], [17]).

The Administrative Law Judge noted that the Division's audit report evidenced that petitioner was unable to document that the vehicles were used exclusively on COMIDA property, but rather indicated that they were often used outside of Monroe County. The Administrative Law Judge found, however, that it is not the opportunity for mobility, as argued by the Division, that is the limiting factor, but rather, the actual location of the project or of the subject equipment purchased in conjunction with the project, that presents the problem. The Administrative Law Judge continued her analysis by stating that had the vehicles been located outside Monroe County on a temporary basis, such temporary absence would not disqualify petitioner's exemption. The Administrative Law Judge found that once the exemption is granted, for the law to be satisfied, the location of the vehicle's usage is the central issue. She found further that petitioner was required to prove either that Monroe County was the only location where the

vehicles were used, except for usage that was merely temporary, or if the location included other counties, that the other affected municipalities consented to the tax exemption.

The Administrative Law Judge determined that petitioner did not carry its burden in this case to show that it remained entitled to the exemption, by evidence establishing that the project remained in Monroe County, was only absent from Monroe County on a temporary basis or that, where the vehicles were located outside the county, COMIDA had the consent of other municipalities as required by law.

### ***ARGUMENTS ON EXCEPTION***

Petitioner takes exception to so much of the Administrative Law Judge's determination that concludes that the matter presented an issue of fact, rather than an issue of law as agreed upon by the parties. Petitioner urges that the Administrative Law Judge erred in concluding that it failed to satisfy its burden of proof that its vehicles were only absent from Monroe County on a temporary basis. Finally, petitioner takes exception to the conclusion that an IDA sales tax exemption on its motor vehicles would ever require the consent of jurisdictions that do not forego any tax revenue by the operation of petitioner's project.

Petitioner argues that we should reverse the Administrative Law Judge and find that only an issue of law was presented or, in the alternative, remand the matter for a determination of further facts. Petitioner also requests that we find that petitioner's vehicles were only absent from Monroe County on a temporary basis and asks that we conclude that the only consent necessary for an IDA sales tax exemption is from a jurisdiction that stands to lose revenue by the operation of a project.

Petitioner argues that COMIDA is empowered to exempt from sales tax any project located within Monroe County and that since petitioner purchased the subject vehicles in Monroe

County, COMIDA could properly exempt petitioner from sales taxes thereon. Petitioner urges that the Division cannot employ the definition of “use” under Article 28 of the Tax Law to deny the exemption from sales tax on the subject vehicles. Petitioner argues that the Division’s interpretation of the IDA provisions of the General Municipal Law is not supported by the language of the statute and that the Division’s interpretation of the statute is not entitled to deference.

The Division maintains that the trucks and rolling stock for which petitioner seeks sales tax exemption, particularly those that can be and are used outside of Monroe County, extend beyond the borders of the county where the tangible personal property is used as an integral part of a project, thereby disqualifying them from sales tax exemption. The Division urges that the location where the vehicles are garaged or located does not control the tax exemption, and that the temporary nature of the subject vehicles being outside of Monroe County is irrelevant. Further, the Division argues that if petitioner wished to use the subject vehicles on projects outside of Monroe County, the law requires petitioner to obtain the consent of such other municipalities.

### ***OPINION***

Sales tax is imposed upon the receipts of every retail sale of tangible personal property except as otherwise provided (Tax Law § 1105[a]). Tax exemption statutes are strictly construed against the taxpayer and exemptions must be clearly indicated by the statutory language (*see, Matter of Fagliarone, Grimaldi & Assocs. v. Tax Appeals Tribunal*, 167 AD2d 767 [3d Dept 1990]).

Tax Law § 1116(a)(1) makes provision for 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, but only “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.”

IDAs are public corporations within the meaning of this provision (*see*, 20 NYCRR 529.2[a][2]).

Additionally, General Municipal Law § 874(1) provides that an IDA “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.” This exemption includes private developers acting as the IDA’s agent for project purposes (*see, Matter of Wegmans Food Mkts. v. Department of Taxation and Fin.* (126 Misc 2d 144 [1984], *affd* 115 AD2d 962 [4<sup>th</sup> Dept 1985], *lv denied* 67 NY2d 606 [1986])).

The purposes of IDAs are defined to include, in relevant part, as follows:

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 . . . (General Municipal Law § 858).

IDAs provide financial assistance, which includes sales tax exemptions (*see*, General Municipal Law § 854[14]), in furtherance of the completion of “projects.” A “project” is defined, in relevant part, by General Municipal Law § 854(4) as follows:

“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 outside 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, commercial or industrial purposes or other economically sound purposes . . . .

Turning to the question of whether the purchase of the subject motor vehicles was exempt from sales tax, General Municipal Law § 854(4) restricts the authority of the IDA as follows:

no agency shall use its funds in respect of any project wholly or 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 a part or parts of the project is, or is to be, located.

Here, petitioner suggests that so long as it purchased the trucks, rolling stock and other personalty within Monroe County and said personalty is garaged there, its purchases are exempt from sales tax, even where it has not shown that said vehicles were being used on a project within the County of Monroe involving a facility suitable for manufacturing, warehousing, etc., under the statute. We disagree. The General Municipal Law provisions, *supra*, clearly contemplate projects involving improvements to real property, “facilities” (e.g., warehousing, industrial or manufacturing) within or partially within Monroe County. The only Project and Facility identified in this record refer to petitioner’s business address in Rochester, yet the evidence shows that the trucks and rolling stock were frequently used outside of Monroe County, i.e., the municipality for whose benefit COMIDA was created.

Petitioner has failed to prove that the use of the rolling stock outside of Monroe County was upon prior consent of the governing bodies of the affected municipalities, as required by General Municipal Law § 854(4).

Petitioner argues that an IDA sales tax exemption on its vehicles would only require the consent of jurisdictions that must forego any tax revenue by the operation of petitioner’s project. Petitioner imposes a condition on the consent requirement of General Municipal Law

§ 854(4) that does not exist in statute. Considering that tax exemption statutes are strictly construed against the taxpayer, petitioner's interpretation is rejected. We note that the taxpayers of Monroe County and the State of New York also have an interest in knowing that the extra tax monies that they pay (so that organizations like COMIDA can be exempt from tax) are properly being applied. Petitioner has offered no evidence regarding neighboring jurisdictions in any event.

We reject petitioner's argument that the only facts that may be considered in this case are those to which the parties stipulated. To accept petitioner's argument would mean that we would be required to selectively ignore the facts of the case and decide this matter without looking at the exhibits in the record. Accordingly, this decision is based on a thorough review of the entire record in this matter.

Petitioner urges that the Administrative Law Judge erred in concluding that it failed to satisfy its burden of proof that its vehicles were only absent from Monroe County on a "temporary" basis. Petitioner and the Administrative Law Judge missed the point. It is not the temporary nature of the use outside of Monroe County that we view as significant. Rather, petitioner has failed to show how the use of the trucks and rolling stock outside of Monroe County related to work on the COMIDA project at issue. As petitioner has not offered proof on that issue, we must conclude that the trucks and rolling stock were working on other project(s) while absent from Monroe County.

The Division argues that the mobility of vehicles licensed for use on the road is sufficient to deny the exemption here. The Division urges that because such licensed and registered vehicles can legally be driven anywhere outside of COMIDA's jurisdiction, they neither become a part of project realty in Monroe County, nor "an integral part of the project" in Monroe County.

Accordingly, the Division would have us deny the subject exemption because of the acknowledged mobility of licensed motor vehicles. While we agree with the Division that the “temporary” absence, by itself, is irrelevant to whether petitioner’s purchases are exempt from sales tax, the Division’s contention that the unique mobility of a motor vehicle precludes any sales tax exemption as part of an IDA project under General Municipal Law § 854(4) must be rejected. Again, it is not the mobility of the vehicle, but whether the trucks and rolling stock have been *shown* by evidence to have been used for the purposes intended and within the statutory parameters set forth in the statute.

The question is whether, by the use of the trucks and other rolling stock outside of Monroe County, the project in question was located outside of Monroe County for purposes of General Municipal Law § 854(4). If so, then given the absence of consent from any other municipalities, COMIDA lacked the authority to provide financial assistance to petitioner in the form of a sales tax exemption on its purchase of the trucks and other rolling stock.

In this case, the evidence does not show that the subject vehicles were used for work on a COMIDA project or became an “integral part” of a COMIDA project, but only that the rolling stock was frequently used on jobs outside of Monroe County. A “project” is not simply the purchase and garaging of an asset in Monroe County, but also the use of that asset in a specified manner. We conclude that since much of the use of the rolling stock occurred outside of Monroe County, it is reasonable to infer that the project(s) at issue was located partially outside of Monroe County for purposes of General Municipal Law § 854(4). Here, the rolling stock in question was frequently used on projects outside of Monroe County, and petitioner has not offered proof that the use, while outside of Monroe County, was related to a project or facility within that County (e.g., hauling supplies, etc.) or that prior consent of any other

jurisdiction was obtained for work on projects outside of Monroe County.<sup>4</sup> Moreover, there being no evidence on these issues, we find that the purchase of the truck and other rolling stock was properly subject to tax.

Petitioner seeks to distinguish between the location of the project and the use of the truck. Since petitioner has failed to prove such distinction, we find its argument without merit.

Petitioner also argues that, consistent with sales tax principles, the location of the project in this case should be determined by where the truck was purchased and is principally garaged. This argument is also rejected. The location of the project is best determined by reference to COMIDA's sales tax letter appointing petitioner as its agent for the project and facility in Monroe County, i.e., petitioner's business address. Since the disputed use of the trucks and rolling stock is outside of the County of Monroe, it was incumbent upon petitioner, seeking to retain the exemption, to come forward with evidence showing how the vehicles were being used in furtherance of a COMIDA project authorized by the statute.

Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated herein. We have reviewed the remaining arguments of petitioner regarding the statutory interpretation and find them without merit. Statutory rules of construction require that legislative intent 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, as here, words of the statute are definite and precise, it is not necessary to look

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<sup>4</sup>Another possible and equally reasonable inference would be that petitioner was using the trucks on roofing jobs outside of Monroe County that had nothing to do with COMIDA.

elsewhere so as to restrict them or extend the meaning (*see, Matter of Erie County Agric. Socy. v. Cluchey*, 40 NY2d 194 [1976]). This is a case where the statute is clear on its face.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Elmer W. Davis, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed consistent with the reasoning and conclusions of this decision;
3. The petition of Elmer W. Davis, Inc. is denied; and
4. The Notice of Determination dated December 26, 2009 is sustained.

DATED: Troy, New York  
August 23, 2010

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

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

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