STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
DURANT ASSOCIATES, LLC	:	DECISION DTA Nos. 822444
for Revision of Determinations 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 December 1, 2006 through November 30, 2007.	:	and 822445

Petitioner, Durant Associates, LLC, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on December 23, 2009. Petitioner appeared by Harris Beach, PLLC (Michael J. Townsend, Esq., John A. Mancuso, Esq. and Robert Ryan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception and in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception. Petitioner and the Division of Taxation each filed a reply brief. Oral argument, at the request of both parties, was heard on December 8, 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, 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 finding of fact "2," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Durant Associates, LLC, (the Company or Durant), was, at all times during the audit period, a New York limited liability company.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> The company was appointed an agent of the County of Monroe Industrial Development Agency (COMIDA) on December 20, 2005 and again on February 20, 2007. In connection with this agency appointment, COMIDA issued sales tax letters (letters or appointment letters) dated December 20, 2005, February 20, 2007 and May 21, 2007, which provided that the appointment was to assist Durant in the purchase of a hydraulic crane, boom lift, service vehicle and other small equipment to be used in connection with the existing facility located a 1217 Clifford Avenue, Rochester, New York.[1]
>
> The December 20, 2005 letter states, in part, as follows:
>
> Pursuant to a resolution duly adopted on December 20, 2005, the County of Monroe Industrial Development Agency (the "Agency") appointed Durant Associates, LLC (the "Company") the true and lawful agent of the Agency to assist in the purchase of a hydraulic crane to be used as mobile transportation equipment for the removal of asbestos (the "Project") to be used in connection with the existing facility located at 1217 Clifford Avenue, Rochester, New York (the "Facility").
>
> Addendum A, attached to the December 20, 2005 letter states that "[t]he 'Facility' consists of the purchase of a hydraulic crane to be used as mobile transportation equipment for the removal of asbestos (the 'Facility')."

[1] The address of the "Facility" as indicated in the appointment letters, 1217 Clifford Avenue, Rochester, New York, was the business address of petitioner during the periods at issue.

The February 20, 2007 letter states, in part, as follows:

> Pursuant to a resolution duly adopted on February 20, 2007, the County of Monroe Industrial Development Agency ("COMIDA") appointed Durant Associates, LLC (the "Company") the true and lawful agent of COMIDA to assist in the purchase of a boom lift, service vehicle and other small equipment (the "Project") located at 1217 Clifford Avenue, Rochester, New York (collectively with the Project, the "Facility").

Addendum A, attached to the February 20, 2007 letter states that "[t]he 'Facility' consists of the purchase of a boom lift, service vehicle and other small equipment (the 'Facility') located at 1217 Clifford Avenue, Rochester, New York."

The May 21, 2007 letter extends the appointment described in the February 20, 2007 letter until August 31, 2007.

Petitioner then purchased, in Monroe County, during the audit period, certain equipment and materials, including a hydraulic crane, a boom lift and a service vehicle. No sales and use taxes were paid on said purchases.[2]

On occasion, the hydraulic crane, boom lift and service vehicle (items in question) left the jurisdictional boundaries of Monroe County. During the audit period, the service vehicle was garaged at petitioner's place of business in Monroe County. The other items of equipment were stored at petitioner's place of business in Monroe County.

The Division of Taxation (Division) conducted an audit of petitioner for the period June 1, 2005 through August 31, 2005 and December 1, 2006 through November 30, 2007.

The Division issued a Notice of Determination, dated January 28, 2008 (Assessment No. L-029641966-5), which assessed sales and use tax in the amount of $5,204.46, plus interest in the amount of $720.29, less payments or credits in the amount of $4,993.73, for a balance due of $931.02. The amount of tax assessed was based on two items: $2,496.31 was assessed on construction equipment purchased under the COMIDA exemption because the items were used

[2] We have modified this fact to more accurately reflect the record.

outside of the jurisdictional boundaries of Monroe County and $2,207.15 was assessed on purchases made prior to the grant of the COMIDA exemption. The tax assessed on equipment purchased prior to the COMIDA exemption is not at issue.

The Division issued a second Notice of Determination, dated January 28, 2008 (Assessment No. L-029640198), which assessed sales and use tax in the amount of $1,547.92, plus interest in the amount of $95.39, for a balance due of $1,643.31. The assessment was premised upon the Division's position that the COMIDA exemption does not apply to the purchase of a vehicle.

The Division determined that the Company was entitled to a refund on expense purchases in the amount of $4,784.77, and this amount was applied to the tax due on fixed asset purchases.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Tax Law § 1105(a) imposes sales tax upon the receipts of every retail sale of tangible personal property unless an exemption is provided. The Administrative Law Judge observed that Tax Law § 1116(a)(1) provides an exemption for government agencies, which would usually include an industrial development agency (IDA).

The Administrative Law Judge determined that the definition of a project as set forth in General Municipal Law § 854 is broad enough to include a truck. The Administrative Law Judge observed that the term equipment, as defined in Webster's Ninth New Collegiate Dictionary (9th ed 2007), would include motor vehicles and concluded that the acquisition of a motor vehicle may constitute a project.

The Administrative Law Judge rejected 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, finding that the statutory provisions only require that the

equipment be deemed necessary, desirable or incidental to property that may or may not be currently in existence. As such, the Administrative Law Judge concluded that the Division improperly denied an exemption to the service vehicle.

Addressing whether the exemption was properly denied for the purchase of the crane and boom lift, the Administrative Law Judge found that a different analysis was required because the items were used outside of Monroe County. The Administrative Law Judge determined that the exemption was properly denied because the items had a presence both within and without Monroe County. The Administrative Law Judge reasoned that, pursuant to General Municipal Law § 854(4), when a project is partially outside of the municipality for whose benefit the agency was created, the agent must obtain consent from the other governing body where the project is located. Finding that no evidence had been produced of prior consent from any other governing bodies where the project was located, the Administrative Law Judge concluded that the exemption was properly denied on these items.

The Administrative Law Judge noted that petitioner's reliance on ***Matter of Xerox v. State Tax Commn.*** (71 AD2d 177 [1979]) is misplaced because that matter did not involve the statutory requirements imposed by General Municipal Law § 854(4) and is therefore inapposite. The Administrative Law Judge found that since no project can be used outside of Monroe County without the consent of an adjoining county, the location where a vehicle is garaged or located is not determinative.

ARGUMENTS ON EXCEPTION

The Division argues that the service truck, as well as the crane and boom lift, were used outside of Monroe County without the consent of the adjacent jurisdiction. The Division asserts that the Administrative Law Judge properly sustained the Notice of Determination assessing tax

on the purchase of the crane and boom lift on the basis that they were used outside of Monroe County without the consent of the adjacent jurisdiction. However, the Division argues that the Administrative Law Judge ignored the fact that the service vehicle was also used outside of Monroe County and no evidence was presented that consent was obtained. As such, the Division contends that the service vehicle should be denied the exemption on the same basis as the crane and boom lift.

The Division also argues that a vehicle cannot be a "project" because under the General Municipal Law provisions, a project must involve land, a building or improvement, and the machinery or equipment purchased must be in connection with land, a building or other improvement. The Division contends that the personal property itself (the service vehicle, crane and boom lift) cannot be a project because there was no showing that the vehicle, crane and boom lift were used exclusively in connection with the land or buildings of a project in Monroe County.

The Division further argues that a motor vehicle, which is innately moveable and by its nature is mobile and capable of traveling outside of the jurisdiction of an IDA, is not entitled to the exemption from sales tax.

Petitioner argues that the Administrative Law Judge properly allowed the exemption for the service vehicle. With regard to the crane and boom lift, 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. Petitioner argues that the Division's interpretation is not supported by the statutory language or legislative history.

Petitioner argues that the plain language of the statute permits COMIDA to exempt from sales tax any project located within Monroe County, and that vehicles alone may constitute a project. Petitioner insists that a brief, transitory use of personal property outside Monroe County is not fatal to the sales tax exemption granted by COMIDA, and contends that the Administrative Law Judge's determination with regard to the crane and boom lift is inconsistent with the Division's precedent. In support of its argument, petitioner cites determinations of other Administrative Law Judges, as well as advisory opinions issued by the Division.

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 Law § 1101(b)(5) defines "Sale, selling or purchase" as:

> Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

The record clearly establishes that Tax Law § 1105(a) would apply to petitioner's purchases. Therefore, unless the service vehicle, crane and boom lift are exempt from tax, sales and use tax were properly imposed on these purchases.

Petitioner argues that it is entitled to a sales tax exemption granted by COMIDA specifically for the purchase of these items. Section 1116(a) 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 . . . .

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 Misc2d 144 [1984], ***affd*** 115 AD2d 962 [4th Dept 1985], ***lv denied*** 67 NY2d 606 [1986]).

We note first that tax exemption statutes are strictly construed against the taxpayer (***Matter of Marriott Family Rests. v. Tax Appeals Trib.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]) and exemptions must be clearly indicated by the statutory language (***see Matter of Fagliarone v. Tax Appeals Trib.***, 167 AD2d 767 [1990]). However, the interpretation should "not be so narrow and literal as to defeat its settled purpose" (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 196 [1975]). The taxpayer bears the burden of demonstrating clear and unambiguous entitlement to the statutory exemption (***see Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992]), and showing that its interpretation of the law is not only plausible, but the only reasonable construction (***see Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.***, 83 NY2d 44 [1993]).

Resolving this matter requires construing statutes within the New York State IDA Act (***see generally*** General Municipal Law Article 18-A). The language of a statute should be considered

in its entirety and all statutes comprising the same act should be construed together (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 97 and 98). The rules of statutory construction provide that "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 words in a statute possess a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***see Matter of Erie County Agric. Socy. v. Cluchey***, 40 NY2d 194 [1976]).

IDAs were established to improve economic conditions by upgrading certain types of "facilities" located within their respective jurisdictions. The Legislature made this intent clear within General Municipal Law § 858, which defines the purpose of IDAs, in pertinent part, as:

> 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, emphasis added).

While the Legislature specifically enumerates types of facilities to which the IDA Act applies (***e.g.*** manufacturing, warehousing), nowhere in the Act is "facility," standing alone, specifically defined.

We reviewed the New York State IDA Act in prior cases, and based on a complete reading of the Act, determined that the Legislature intended "facility" to refer to either real property or buildings (***see Matter of Conking and Calabrese***, Tax Appeals Tribunal, January 13, 2011; ***Matter of Elmer W. Davis***, Tax Appeals Tribunal, August 23, 2010). In those cases, we held that a vehicle, alone, does not constitute a facility (***Matter of Conking and Calabrese***, ***supra***)

and stated that "[t]he 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" (***Matter of Elmer W. Davis***, ***supra***).

While we find that a vehicle, alone, does not constitute a facility, and the purchase of a vehicle alone, without a designated facility, does not constitute a "project" (***Id.***), we have stated that a purchase of tangible personal property may constitute a "project" if such property is installed or used upon a facility (***see Matter of Henrietta Bldg. Supplies***, Tax Appeals Tribunal, April 21, 2001; ***Matter of Maven Technologies***, Tax Appeals Tribunal, May 26, 2011; ***Matter of Midtown Tire***, Tax Appeals Tribunal, May 26, 2011). A "project" is defined, in relevant part, by General Municipal Law § 854(4), as in effect during the period at issue, 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 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 . . . .

We reject the Division's argument 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). As we stated in ***Davis***, "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" (***Matter of Elmer W. Davis***, ***supra***). To meet its burden of proof, petitioner must show that the service vehicle, crane and boom lift were used for work on a COMIDA project or became and "integral part" of a COMIDA project (***Id.***). As we stated previously, "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" (***Id.***). The only project identified in the record refers to petitioner's purchase of the items at issue and the only facility identified in the record refers to petitioner's business address in Rochester (Monroe County), yet the evidence shows that the trucks were frequently used outside of Monroe County, *i.e.* the municipality for whose benefit COMIDA was created and the only county where COMIDA has authority to act (***see Matter of Elmer W. Davis***, ***supra***; ***see also Matter of Upstate Roofing***, Tax Appeals Tribunal, January 13, 2011).

The language of General Municipal Law § 854(4) clearly 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 contiguous with the portion of the project inside the municipality.

It was established that the service vehicle, crane and boom lift were used partially in other jurisdictions (*i.e.*, outside the municipality for whose benefit COMIDA was created) and no evidence was produced that prior consent had been obtained from the governing body of any other municipality, or that the requirement that prior consent be obtained was inapplicable in these circumstances. Therefore, we conclude that the exemption was properly denied by the Division on all of the items because, as conceded by petitioner, the service vehicle, crane and boom lift had a presence both within and without Monroe County. The Administrative Law Judge correctly applied the consent requirements of General Municipal Law § 854(4) to the crane and boom lift, and properly determined that petitioner was not entitled to an exemption from tax on its purchase of these items. However, we find that the same consent requirements apply to the

service vehicle, and conclude that the Administrative Law Judge improperly allowed an exemption for the purchase of said item.

We reject petitioner's argument 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. We rejected this same argument in previous cases involving analogous facts and issues, noting that "petitioner imposes a condition on the consent requirement of General Municipal Law § 854(4) that does not exist in statute" (***Matter of Elmer W. Davis***, ***supra***; ***see also Matter of Conking and Calabrese***, ***supra***).

We further note that petitioner cites numerous Administrative Law Judge determinations and advisory opinions, claiming that they are precedent that support its argument. Tax Law § 2010(5) states that determinations "shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state." Additionally, Tax Law § 171(24) provides that advisory opinions are not binding on the Division except with respect to the person to whom the opinion is rendered. As such, we find petitioner's argument citing these determinations and advisory opinions to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The exception of Durant Associates, LLC is denied;

3. The determination of the Administrative Law Judge is reversed to the extent that the exemption is denied for the purchase of the service vehicle, but is otherwise affirmed;

4. The petition of Durant Associates, LLC is denied; and

5. The Notices of Determination dated January 28, 2008, are sustained.

DATED:Troy, New York
June 2, 2011

/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