

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

UPSTATE ROOFING & PAINTING, INC. :

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 March 1, 2005 through :
August 31, 2005. :
:

In the Matter of the Petition :

of :

DAVID PASTORE :

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 March 1, 2005 through :
August 31, 2005. :
:

In the Matter of the Petition :

of :

ROBERT MORGAN :

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 March 1, 2005 through :
August 31, 2005. :
:

DECISION
DTA Nos. 822482,
822483, 822484 and
822485

In the Matter of the Petition	:
of	:
KIMBERLY ELLIOTT	:
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 March 1, 2005 through	:
August 31, 2005.	:

Petitioners, Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott, filed an exception to the determination of the Administrative Law Judge issued on January 21, 2010. Petitioners appeared by Harris Beach, PLLC (Michael J. Townsend, Esq. and Robert J. Ryan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on July 14, 2010, in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Nesbitt took no part in the consideration of this matter.

ISSUE

Whether the purchases of a crane and a service truck were exempt from sales and use taxes pursuant to Tax Law § 1116(a)(1) and General Municipal Law § 874(1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Following an audit, the Division of Taxation (Division) issued to petitioners, Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott, notices of determination, each of which asserted \$15,118.48 in additional sales tax due, plus interest, for the period March 1, 2005 through August 31, 2005.¹

Petitioners Pastore, Morgan and Elliott were assessed as responsible officers of petitioner Upstate Roofing pursuant to Tax Law § 1131(1) and § 1133(a). These petitioners acknowledge their status as officers of Upstate Roofing and do not contest their status as persons responsible to collect tax under Tax Law § 1131(1).

Petitioner Upstate Roofing,² a New York corporation, is engaged in the business of installing, maintaining and repairing complex commercial roofing systems. Petitioner's business is located in Monroe County, New York.

Petitioner was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on February 15, 2005. The minutes of COMIDA's February 15, 2005 meeting indicate that petitioner "will be replacing four fleet vehicles."

In connection with this agency appointment, COMIDA issued to petitioner an appointment letter dated February 15, 2005 that provides, in relevant part, as follows:

Pursuant to a resolution duly adopted on February 15, 2005, the County of Monroe Industrial Development Agency (the "Agency") appointed Upstate Roofing, Inc. (The "Company") the true and lawful agent of the Agency to assist in the purchase of four (4) service trucks and engineering software (the "Project") to be used in connection with the existing facility located at . . . Town of Henrietta, New York (the "Facility").

¹ The notice issued to Upstate Roofing was dated November 9, 2007. The notices issued to petitioners, Pastore, Morgan and Elliott were dated November 13, 2007.

² Unless otherwise indicated, all references to petitioner refer to Upstate Roofing.

The agency created by this letter is limited to the Facility, of course, and will expire on February 15, 2006.

* * *

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; (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.

* * *

The State of New York provides in § 874 of the General Municipal Law that Industrial Development Agencies are exempt from property and sales tax. However, for the Company, as agent of the IDA, to properly obtain and utilize this tax-exempt status, there are certain steps that you must comply with.

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.

* * *

This letter is provided for the sole express purpose of securing exemption from New York State Sales Tax for this project only. No other principal/agent relationship is intended or may be implied or inferred by this letter.

The address for the "Facility" in the appointment letter is the address of petitioner's place of business.

Petitioner subsequently purchased, in Monroe County, a service truck and a crane.

Petitioner did not pay sales tax on these purchases. These vehicles are registered to be operated on the highways of the State of New York.

On audit, the Division determined that petitioner's purchases of the service truck and crane were properly subject to sales tax. Upon review of the relevant invoices, the Division determined \$1,998.48 in tax due on the purchase of the service truck and \$13,120.00 in tax due on the purchase of the crane for a total of \$15,118.48 in additional tax due, as reflected in the notices of determination.

The service truck and the crane in question were garaged at petitioner's place of business at all times during the audit period.

On occasion, the service truck and the crane, while in use as part of petitioner's business operations, temporarily left the jurisdictional boundaries of Monroe County.

All uses of the service truck were consistent with the description of the project as indicated in the February 15, 2005 appointment letter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Industrial Development Agencies ("IDAs") provide financial assistance, which includes sales tax exemptions in furtherance of the completion of "projects," as defined, in relevant part, by General Municipal Law § 854(4) as being:

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 . . .

The Administrative Law Judge found that petitioner's purchase of the crane was properly subject to sales tax, since petitioner produced no evidence to show that COMIDA authorized this

purchase, pointing out that the February 15, 2005 letter appointing petitioner as agent of COMIDA makes no reference to the purchase of a crane. Similarly, the Administrative Law Judge noted that the minutes of COMIDA's February 15, 2005 meeting do not refer to the purchase of a crane, but only to the replacement of "four fleet vehicles." Therefore, the Administrative Law Judge found that petitioner failed to establish that it was acting as an agent of COMIDA in purchasing the crane or that the purchase of a crane was part of a project. Accordingly, the Administrative Law Judge found that the exemption under Tax Law § 1116(a)(1) does not apply, and that General Municipal Law § 874(1) did not prohibit the imposition of sales tax in this case.

The Administrative Law Judge next addressed the issue of whether the purchase of the service truck was exempt from sales tax, noting that General Municipal Law § 854(4) restricts the authority of an IDA in that no IDA may 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."

Here, the service truck in question was admittedly used on occasion outside of Monroe County, i.e., the municipality for whose benefit COMIDA was created, and the Administrative Law Judge observed that there is no indication that consent for such use was obtained from the governing bodies of such other municipalities.

The Administrative Law Judge observed that the question presented was whether the occasional use of the truck outside of Monroe County, the project in question, was "located" partially outside Monroe County for purposes of General Municipal Law § 854.

Based on the February 15, 2005 letter, the Administrative Law Judge found that the project

consisted of the purchase of a service truck “to be used in connection with the existing facility,” which is within Monroe County. The project was not, the Administrative Law Judge determined, simply the purchase of an asset, but also the use of that asset in a specified manner in connection with “the facility” located inside Monroe County.³ Here, the Administrative Law Judge found that the truck in question was always used in accordance with the February 15, 2005 letter and therefore always engaged in project activity, as defined in the letter. Accordingly, the Administrative Law Judge reasoned that to the extent such use occurred in another municipality, it was reasonable to conclude that the project is located partially in such other municipality. The Administrative Law Judge found that since the truck was occasionally used outside of Monroe County, the project at issue was located partially outside Monroe County for purposes of General Municipal Law § 854. There being no evidence that consent for such use was obtained from the governing bodies of such other municipalities, the Administrative Law Judge determined that the purchase of the truck was subject to tax.

Petitioner next argued that “located” for purposes of General Municipal Law § 854 means “established,” which connotes a greater sense of permanence than “use.” The Administrative Law Judge also rejected this argument, noting that COMIDA itself defined the project as the purchase of a truck “to be used” in a certain manner. Given this definition, the Administrative Law Judge found that the specified use of the truck was the project and the location of that use must necessarily be the location of the project.

³ Although the February 15, 2005 letter contains the parenthetical “the ‘Project’” immediately following the clause “to assist in the purchase of four (4) service trucks and engineering software,” reading the sentence as a whole shows that the use of the purchased items “in connection with the existing facility” is a required element of the project. This interpretation is supported by the next sentence in the letter, which provides in relevant part: “The agency created by this letter is *limited to the Facility, of course*” (emphasis added).

The Administrative Law Judge also rejected petitioner's argument 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. The Administrative Law Judge found that the location of the project is best determined by reference to COMIDA's definition of the project and petitioner's use of the truck. That definition permits the use of the truck and, therefore, the project, to occur outside of Monroe County. Since petitioner occasionally used the truck outside of Monroe County, the project was partially located outside Monroe County.

Petitioner countered that since the truck was purchased and garaged in Monroe County, COMIDA's sales tax exemption in this case affected only Monroe County. Petitioner asserted that since no tax revenue was lost by any other county, COMIDA was not required to obtain the consent of any other jurisdiction. The Administrative Law Judge observed that petitioner imposes a condition on the consent requirement not found in the General Municipal Law § 854. The Administrative Law Judge found that the statute does not impose such a condition, and rejected petitioner's interpretation.

The Administrative Law Judge also rejected 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. The Administrative Law Judge found this argument had no support in the statute and, in any event, was moot given the remainder of his determination.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the Administrative Law Judge's conclusion that petitioner's purchase of the crane and service truck in this case were not properly exempt from tax by COMIDA. Petitioners assert that, as a matter of law, the acquisition of personal property qualifies as a project.

Petitioners argue that the Administrative Law Judge erred in concluding that an IDA cannot grant a sales tax exemption for vehicles used outside the municipality without the consent of the governing body of the other municipality. Petitioners also argue, based on the Court's decision in *Matter of Wegmans Food Mkts. v. Department of Taxation and Fin.*, 126 Misc 2d 144 (1984) *aff'd* 115 AD2d 962 (1985), *lv denied* 67 NY2d 606 (1986), that the act of purchasing a vehicle is itself the "project" under section 854(4) of the General Municipal Law. Petitioners urge that COMIDA may exempt personal property, as a project, which is located ("purchased") within Monroe County. Petitioners argue that when an agent of COMIDA purchases equipment, that purchase is itself a "project" and exempt under General Municipal Law § 874 from sales tax the moment it is delivered to the facility within COMIDA's jurisdiction.

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 since the truck for which petitioner seeks a sales tax exemption is used outside of Monroe County, such use outside the jurisdiction disqualifies it from the 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 (*see* 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 v. Tax Appeals Trib.*, 167 AD2d 767 [1990]).

Tax Law § 1116(a)(1) provides 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., supra*).

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 (*see* General Municipal Law § 854[14]), including sales tax exemptions, 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 service truck 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.

We affirm the determination of the Administrative Law Judge.

Dealing with petitioner’s purchase of the crane, we agree with the Administrative Law Judge, for the reasons set forth in his determination, that the purchase was not exempt from sales tax. A crane was clearly not an item contemplated by COMIDA in its letter dated February 15, 2005 appointing petitioner as its agent. Thus, the purchase of the crane was properly subject to sales tax.

We next address petitioner’s purchase of the service truck. Petitioner admits that the service truck was sometimes used outside of Monroe County. Having admitted that fact, it was petitioner’s burden to show, in order to be entitled to retain the exemption, whether, and to what extent such use was or was not on a project outside of the county of Monroe. Petitioner could have offered evidence to show that it had properly used the truck on a project outside of Monroe

County upon showing consent of the “governing body or bodies of all the other municipalities” in which part or parts of the project is located (General Municipal Law § 854[4]). Petitioner failed to demonstrate an entitlement to the exemption.

The General Municipal Law provisions 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 the Town of Henrietta in Monroe County, yet there is no dispute that the truck is 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, Inc.*, Tax Appeals Tribunal, August 23, 2010).

We have considered and reject petitioners’ argument regarding the statutory interpretation of General Municipal Law § 854 and find it to be without merit (*see Matter of Elmer W. Davis, Inc., supra*). As noted earlier, tax exemption statutes are strictly construed against the taxpayer and exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone v. Tax Appeals Trib., supra*). 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 (*see 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 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 (*see Matter of Elmer W. Davis, Inc., supra*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott are denied; and
4. The Notices of Determination dated November 9, 2007 and November 13, 2007 are sustained.

DATED: Troy, New York
January 13, 2011

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

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