STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **AMERICAN FRUIT & VEGETABLE COMPANY, 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 Periods June 1, 2005 through August 31, 2005 and March 1, 2006 through May 31, 2006.	:	DECISION DTA NO. 822631

Petitioner filed an exception to the determination of the Administrative Law Judge issued on April 8, 2010. Petitioner appeared by Harris Beach, PLLC (Michael J. Townsend, Esq., John A. Mancuso, Esq. and Robert J. Ryan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on February 16, 2011, 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 two delivery trucks.

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.

American Fruit & Vegetable Company, Inc. (petitioner), a wholesale distributor of fresh fruits, vegetables, herbs, salad dressings, juices and nuts throughout western New York State, 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:

> Petitioner was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on June 21, 2005 and a second time on March 21, 2006. In connection with these agency appointments, COMIDA issued sales tax letters to enable petitioner, its agent, to make certain purchases exempt from sales tax.
>
> The first sales tax letter, dated June 21, 2005, provided the following:
>
> Pursuant to a resolution duly adopted on June 21, 2005, the County of Monroe Industrial Development Agency (the "Agency") appointed American Fruit & Vegetable Company (the "Company") the true and lawful agent of the Agency to assist in the purchase of (1) 2005 Mitsubishi Fuso FE180, serial number JL6CCH1545K000508 (the "Project") to be used in connection with the existing facility located at 205 Mushroom Boulevard, Rochester, New York (the "Facility").
>
> The second sales tax letter, dated March 21, 2006, provided the following:
>
> Pursuant to a resolution duly adopted on March 21, 2006, the County of Monroe Industrial Development Agency (the "Agency") appointed American Fruit & Vegetable Company (the "Company") the true and lawful agent of the Agency to assist in the purchase of a delivery truck (the "Project") to be used in connection with the existing facility located at 205 Mushroom Boulevard, Rochester, New York (the "Facility").
>
> Both sales tax letters included the following paragraphs:

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; and (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.

* * *

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. The supplier or vendor should identify the Facility on each bill or invoice and indicate thereon which of the Company, its agents, subagents, contractors and subcontractors acted as agent for the Agency in making the purchase.

A copy of the appointment letter retained by any vendor or seller may be accepted by such vendor or seller as a "statement and additional documentary evidence of such exemption" as provided by New York Tax Law § 1132(c)(2), thereby relieving such vendor or seller from the obligation to collect sales and use tax with respect to the construction and installation and equipping of the Facility.

Petitioner then purchased, in Monroe County, certain equipment, including two delivery trucks, including the Mitsubishi FE180 identified in the first sales tax letter.[1]

The delivery trucks were regularly used to make deliveries of fruit and vegetables in Monroe County and were occasionally used to make such deliveries in counties other than Monroe County.

The Division of Taxation (Division) conducted an audit of petitioner for the period March

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

1, 2004 through February 28, 2007. Capital acquisitions made using the COMIDA exemption were reviewed in detail.

The Division asserts that sales tax is due in the amount of $8,225.31, plus interest, and issued a Notice of Determination dated August 25, 2008 to petitioner, asserting tax in that amount on the purchase of such delivery trucks based upon the Division's position that the COMIDA exemption does not apply to these purchases.

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

> The review of Capital-COMIDA records determined that additional taxable purchases of $102,816.38 were discovered, resulting in additional tax due of $8,225.31 (see Schedule E2 on page C-5b). The basis of tax due is vehicles purchased with an invalid COMIDA exemption (see page C-10A for Vehicle invoices). Taxpayer makes deliveries of fruits and vegetables all across Western NY and the vehicles do not stay strictly within the County of Monroe.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The issue addressed by the Administrative Law Judge was whether denial of the COMIDA exemptions for delivery trucks was proper when the exempt properties were actually used outside of Monroe County. The Administrative Law Judge noted that petitioner's reliance upon ***Matter of Xerox v. State Tax Commn.*** (71 AD2d 177 [1979]) was inappropriate because that case addressed taxability in the context of the rental of hanger facilities, whereas the instant matter concerns whether an exemption granted by COMIDA may extend beyond the agency's jurisdictional borders of Monroe County. The Administrative Law Judge considered the IDA statute and determined that the purchases at issue were not exempt. Accordingly, the Administrative Law Judge denied the petition and sustained the Notice of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner raised identical arguments as those raised before the Administrative Law Judge. To wit, petitioner maintains that, as a properly appointed agent of COMIDA, its purchase of the delivery trucks in question is exempt from sales tax. It contends that, even if the delivery trucks leave the agency's jurisdiction, COMIDA may grant the exemption because sales tax is implemented at the point-of-sale and, as the delivery trucks were purchased within Monroe County, no other jurisdiction would be affected. In the alternative, petitioner contends that brief, transitory use of the delivery trucks outside of Monroe County is not fatal to the exemption granted by COMIDA because the property was based and garaged in Monroe County. Petitioner further argues that the Division's interpretation of the IDA statute is illogical and unsupported by either the statutory language or legislative history.

The Division argues that mere purchasing of vehicles cannot be a project under General Municipal Law § 854. It further contends that petitioner is not entitled to the exemption because it took the delivery trucks outside of Monroe County, which is both outside the jurisdiction of COMIDA and counter to the limitations provided in the sales tax letter. The Division contends that, in order for petitioner to have retained the exemption, it would have needed to acquire the consent of the jurisdictions in which the vehicle traveled. The Division also argues that petitioner's interpretation of the IDA statue lacks a foundation in either the statutory language or the legislative history.

OPINION

We affirm the determination of the Administrative Law Judge.

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 delivery trucks are exempt from tax, sales and use tax was properly imposed on these purchases.

Petitioner argues that it is entitled to a sales tax exemption granted by COMIDA specifically for the purchase of the two delivery trucks. Section 1116(a) of the Tax Law provides an exemption from state taxes to 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 Maven Technologies***, Tax Appeals Tribunal, May 26, 2011; ***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 (***see Matter of Midtown Tire***, Tax Appeals Tribunal, May 26, 2011; ***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 note that a purchase of tangible personal property may constitute a "project" if such property is installed or used upon a facility (***see Matter of Wegmans Food Mkts., supra***). 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 . . . 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 subject vehicles were used for work on a COMIDA project such that they became an "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 and facility identified in the record refer to petitioner's business address in Rochester (Monroe County), yet the evidence shows that the trucks were 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.

The record establishes that the delivery trucks were used partially in other jurisdictions, outside the municipality for whose benefit COMIDA was created. Petitioner produced no evidence that prior consent had been obtained from the governing body of any other municipality. Therefore, we conclude that the exemptions were properly denied because, as conceded by petitioner, the vehicles at issue had a presence both within and without Monroe County.

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 for 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 American Fruit & Vegetable Company, Inc. is denied;

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

3. The petition of American Fruit & Vegetable Company, Inc. is denied; and

4. The Notice of Determination dated August 25, 2008, is sustained.

DATED:Troy, New York
August 4, 2011

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

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