

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions :  
of :  
**THE CONKING AND CALABRESE CO., INC.** : DECISION  
**AND DONN J. CALABRESE** : DTA Nos. 822727 and  
: 822737  
for Revision of Determinations or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax :  
Law for the Period September 1, 2006 through :  
November 30, 2006. :

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Petitioners, The Conking and Calabrese Co., Inc., and Donn J. Calabrese, filed an exception to the determination of the Administrative Law Judge issued on January 7, 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. (Lori P. Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal 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.

***ISSUE***

Whether petitioners' purchase of a truck pursuant to authority granted by an industrial development agency is a project or a facility within the meaning and intent of Article 18-A of the General Municipal Law.

***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.

Petitioner, The Conking and Calabrese Co., Inc. (the Company) is, and at all times during the audit period was, a New York corporation. The Company is a building supply and materials distributor located in the Village of Fairport, New York.

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

At a November 21, 2006 meeting, the County of Monroe Industrial Development Agency ("IDA" or together referenced as "COMIDA") adopted a resolution appointing the Company as its agent for the purchase of a 2001 Sterling LT9513 boom truck. The minutes of the meeting state, in relevant part, that:

The Conking and Calabrese Company, Inc. (C&C) is a building supply and materials distributor located in the Village of Fairport. C&C will be purchasing a 2001 Sterling LT9513 boom truck. The cost of the Truck is \$100,600.00. C&C employs 18 FTEs and will be creating two new full time positions.<sup>1</sup>

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

In connection with this agency appointment, COMIDA issued a sales tax letter to enable the Company, its agent, to make certain purchases exempt from sales tax. The letter states, in relevant part, that:

Pursuant to a resolution duly adopted on November 21, 2006, the County of Monroe Industrial Development Agency ("COMIDA") appointed The Conking and Calabrese Company, Inc. (the "Company") the true and lawful agent of

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<sup>1</sup> We have modified this fact to include excerpts from the source documents.

COMIDA to assist in the purchase of a 2001 Sterling LT9513 boom truck (the “Project” or the “Facility”).<sup>2</sup>

The Company then purchased, in Monroe County, certain equipment, comprised of one 2001 Sterling LT9513 boom truck for \$100,600.00.

The truck was primarily used to transport equipment in Monroe County and was occasionally used to transport equipment in counties other than Monroe County. The truck was exclusively garaged in Monroe County at all times during the audit period.

The Division of Taxation (Division) conducted a detailed audit of the Company’s capital acquisitions for the period September 1, 2004 through February 28, 2007.

By Notice of Determination, dated November 11, 2008, covering the period September 1, 2006 through November 30, 2006, the Division assessed \$8,048.00 in tax, plus interest, on the purchase of the boom truck, based on the Division’s position that the COMIDA exemption did not apply to this purchase.

On November 10, 2008, the Division issued a Notice of Determination to petitioner Donn J. Calabrese, which assessed the same amount of tax for the same period, based on its assertion that, during the period at issue, Mr. Calabrese was an officer or responsible person of the Company.

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

The Administrative Law Judge determined that based on the clear and precise language of the statute, petitioners’ purchase of the boom truck does not qualify as either a “project” or “facility” as those terms are used in Article 18-A of the General Municipal Law. Therefore, the Administrative Law Judge concluded that it does not qualify for the tax exemption provided in Tax Law § 874(1).

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<sup>2</sup> We have modified this fact to include excerpts from the source documents.

The Administrative Law Judge found that petitioners' arguments sought to impermissibly expand the exemption power of IDAs to include alleged projects involving personal property that bore no connection to facilities (i.e., land, building, or other improvements), as defined and meant by the authorizing statutes.

The Administrative Law Judge concluded that the purchase of the boom truck did not come within the definition of "project" as that term is defined and used in the General Municipal Law. The Administrative Law Judge stated that when the statute is clear, "the courts must follow the plain meaning of its words" (*see* Determination, conclusion of law "F").

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

On exception, petitioners contend that they are entitled to the exemption because the acquisition of the boom truck was made pursuant to the Company's appointment as a COMIDA agent on a valid project.

Petitioners argue that purchasing the 2001 Sterling LT9513 boom truck was a valid project and that it was within the legal jurisdiction of COMIDA to grant the sales tax exemption to the Company. They take issue with the holding below that, in order to establish a valid project, the IDA must designate a facility consisting of real property, either in existence or under construction. Petitioners argue that an IDA need not designate a valid facility for a project and, therefore, it does not matter whether the boom truck is a facility. Petitioner contends that the point of sale should be the location for determining the project location.

The Division defends the determination by adopting the arguments therein.

### ***OPINION***

Sales tax is imposed on the receipts from every retail sale of tangible personal property (*see* 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 would apply to petitioners' purchase of the 2001 Sterling LT9513 boom truck.

Petitioners seek to retain a sales tax exemption granted by COMIDA specifically for the purchase of the boom truck. Tax exemptions must be strictly construed against the taxpayer (*Matter of Marriott Family Rests. v. Tax Appeals Trib.*, 174 AD2d 805 [1991], *lv denied* 78 NY2d 863 [1991]); 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 their 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 (*see e.g.* manufacturing, warehousing), nowhere in the Act is “facility,” standing alone, specifically defined.

A complete reading of the New York State IDA Act reveals that the Legislature intended “facility” to refer to either real property or buildings (*see Matter of Elmer W. Davis, Inc.*, Tax Appeals Tribunal, August 23, 2010). Consistent with its ordinary, everyday meaning, facility refers to “something designed, built or installed” for a specific purpose (Random House Webster’s College Dictionary 466 [2<sup>nd</sup> Ed 1997]). General Municipal Law § 854 supports this interpretation by specifically defining certain facilities as including lands, buildings, and integrated personal property (*see e.g.* General Municipal Law §854[8], [9], [10], [11], and [12]; *see also Matter of Wegmans Food Mkts. v. Department of Taxation and Fin*, 126 Misc 2d 144 [1984], *affd* 115 AD2d 962 [1985], *lv denied* 67 NY2d 606 [1986] [hereafter, *Wegmans I*]). Further, an IDA must designate real property as a facility because, under the statutory scheme

and case law, the location of the facility becomes the project location for both jurisdictional and tax purposes.<sup>3</sup>

General Municipal Law § 874(1) provides that an IDA "shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and 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." These benefits, including sales tax exemptions, may flow to a designated agent when the agent acts pursuant to a valid project within the IDA jurisdiction (*see Matter of Fagliarone v. Tax Appeals Trib.*, 167 AD2d 767 [1990]). Therefore, to carry their burden, petitioners must prove that their purchase of the 2001 Sterling LT9513 boom truck was a project to improve a facility, including real property, located within Monroe County.

We hold that petitioners are not entitled to the sales tax exemption because designating the 2001 Sterling LT9513 boom truck as a facility fails to establish COMIDA jurisdiction. The boom truck simply is not a facility. It does not meet the definition of a facility within the New York State IDA Act because it is neither land nor a building located within Monroe County. The boom truck also does not meet the common definition of facility because it was neither designed nor installed to afford a specific convenience or service (Random House Webster's College Dictionary 466 [2<sup>nd</sup> Ed 1997]). As such, designating the boom truck as a facility is improper because it is "out of harmony with [and] inconsistent with the plain meaning of the statutory language" (*Trump-Equitable v. Gliedman*, 57 NY2d 588, 595 [1982]). Absent the designation

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<sup>3</sup> See e.g. *Matter of Regeneron Pharm. v. McCarthy*, 2010 NY Slip Op 509138; *Village of Canajoharie v. Planning Bd.*, 63 AD3d 1498 [2009]. There is no case where the facility and the project location differ because, necessarily, the project always consists of acquiring, upgrading, furnishing or otherwise improving either real property or an building upon real property (*see e.g. Wegmans I, supra*). As discussed above, the real property or building is otherwise known as a facility.

of a proper facility within Monroe County, petitioners cannot prove that the grant of the exemption for purchase of the 2001 Sterling LT9513 boom truck was within the legal jurisdiction of COMIDA. Accordingly, petitioners failed to carry their burden of showing clear entitlement to the subject exemption.

We further reject petitioners' arguments on this point as unreasonable. It is well-settled that an administrative agency "cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute" (*Trump-Equitable v. Gliedman, supra* at 595, *citing Matter of Jones v. Berman*, 37 NY2d 42 [1975]). Applying these settled principles, we cannot accept petitioners' suggestion that the point of sale establishes the location of the project for tax and jurisdictional purposes. Imputing the point of sale as the project location runs counter to the scheme of the New York State IDA Act, as well as prior case law (*see e.g. Matter of Regeneron Pharm. v. McCarthy, supra; Village of Canajoharie v. Planning Bd, supra; Steel Los III v. Board of Assessors*, 10 NY3d 445 [2008]). Further, petitioners' argument that a project does not require the designation of a facility is also rejected. General Municipal Law § 858 establishes the purpose of IDAs as acquiring, improving and upgrading facilities.

We need not address whether the purchase of the 2001 Sterling LT9513 boom truck constitutes a project because petitioners failed to show that the project was located in Monroe County, i.e., within the jurisdiction of COMIDA. The balance of petitioners' arguments are rendered moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Conking and Calabrese Co., Inc. and Donn J. Calabrese is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of The Conking and Calabrese Co., Inc. and Donn J. Calabrese are denied; and
4. The Notices of Determination dated November 10, 2008 and November 11, 2008 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

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