

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ELMER W. DAVIS, INC. : DETERMINATION
 : 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. :

Petitioner, Elmer W. Davis, Inc., filed a petition 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.

On October 3, 2008 and October 9, 2008, respectively, petitioner, by Harris Beach, PLLC (Michael J. Townsend, Esq., of counsel), and the Division of Taxation, by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by March 20, 2009, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

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

The parties stipulated to the following facts (Findings of Fact 1 through 5):

1. Elmer W. Davis, Inc. (petitioner), a roofing contractor, is, and at all times during the audit period was, a New York corporation.
2. Petitioner was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on June 21, 2005. In connection with this agency appointment, COMIDA issued a sales tax letter to enable petitioner, its agent, to make certain purchases exempt from sales tax. Petitioner then purchased, in Monroe County, certain equipment and materials, including several trucks and related items of “rolling stock.”
3. On occasion, the trucks and related items left the jurisdictional boundaries of Monroe county, but were at all times garaged at petitioner’s principal place of business in Monroe county.
4. 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.
5. 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.

6. 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.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner maintains that as a properly appointed agent of COMIDA, it was entitled to purchase the vehicles in question exempt from sales tax, and the jurisdiction where the vehicles are garaged controls the sales tax rate.

8. The Division argues that the mobility of a motor vehicle for which the agency seeks sales tax exemption, particularly one which can be and is used out of the subject jurisdiction, extends it beyond the borders of the county where the tangible personal property is used as an integral part of a project, thereby disqualifying it for exemption from sales tax. The Division further maintains that the location where the vehicles are garaged or located does not control the tax exemption.

CONCLUSIONS OF LAW

A. The County of Monroe Industrial Development Agency (COMIDA) is a public benefit corporation established under General Municipal Law Article 18-A, and is generally exempt from sales and use tax pursuant to General Municipal Law § 874, in conjunction with Tax Law § 1116. This exemption has been interpreted as extending to an agent of the industrial development authority for the purposes of a particular project (*see Matter of Wegmans Food Mkts.v. New York State Dept. of Taxation and Finance*, 126 Misc 2d 144, 481 NYS2d 298 [1984], *affd* 115 AD2d 962, 497 NYS2d 790 [1985], *lv denied* 67 NY2d 606, 501 NYS2d 1025 [1986]). 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. COMIDA appointed petitioner as its

agent and in the context of a project, petitioner purchased motor vehicles and other moveable equipment. The Division does not dispute the proper appointment of petitioner as agent of COMIDA, but rather maintains that since a motor vehicle registered by New York State for over the road use can legally be driven anywhere, it does not become a part of the project realty in Monroe County or an integral part of the project.

B. The term “project” as defined by the General Municipal Law former § 854(4) is as follows, in pertinent part:

“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, . . . which shall be suitable for. . . commercial or industrial purposes or other economically sound purposes identified . . . provided, however, 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 (Emphasis supplied).¹

¹ General Municipal Law § 854(4) (as amended by L 1997 ch 444, § 8[3]) provides:

“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 identified and called for to implement a state designated urban cultural park management plan as provided in title G of the parks, recreation and historic preservation law and which may include or mean an industrial pollution control facility, a recreation facility, educational or cultural facility, a horse racing facility or a railroad facility, provided, however, 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.

A project under this provision of the General Municipal Law may involve personal property, including that which is acquired in connection with qualified land, buildings or other improvements. Accordingly, the acquisition of equipment alone can constitute a project. Whether the acquisition of the vehicles was a project, or the vehicles were acquired in conjunction with a project, the next determination is whether the project is located within the municipality for whose benefit the industrial development agency was created, i.e., in this case, Monroe County. If the project, or the vehicles acquired incident to the project were located even partially outside Monroe County, COMIDA is limited as to its issuance of financial assistance, such as bond proceeds and exemptions from taxation, unless it obtains prior consent from the governing bodies of all the other municipalities where the project is located (General Municipal Law §§ 854[4], [17]). Although the Division's field audit report suggested that the taxpayer was unable to provide documentation that showed the vehicles were used exclusively on COMIDA property, but rather indicated that they were frequently located outside of Monroe County, the Division seemed to base its exemption denial on the mere fact that the subject of the exemption was vehicles with on-road usage.

C. Petitioner continues to maintain that the location of vehicles is controlled by where they are garaged, serviced and maintained, relying in part on the holding in *Matter of Xerox v. State Tax Commn.*, (71 AD2d 177, 422 NYS 2d 493 [1979]), to support its argument that the sales tax on vehicles is controlled by the jurisdiction in which they are garaged. In that matter, the issue was strictly a tax matter, without the additional considerations imposed upon industrial development agencies, such as COMIDA, pursuant to the General Municipal Law. Further, the sales and use tax issue did not concern the purchase of the subject aircraft, but rather the rental of the hanger facilities where the aircraft was stored, regularly serviced and maintained. The Court found the location of the hangar to dictate the applicable rate of tax and noted the exception to this rule

would arise if essentially all the use of the vehicle occurred in another jurisdiction. The facts of Xerox are not at all similar, and the provisions of the law applicable in that case do not apply to the issues presented herein.

Petitioner argues that the flaw in the Division's reasoning centers largely on the Division's terminology interpretation, equating "located" in Tax Law § 854 with the term "used," by using such terms interchangeably. If the vehicles were located in a particular jurisdiction, it is a safe assumption they were being used there. I do not find the argument based on semantics controlling. However, I do agree with petitioner's conclusion from advisory opinions relating to software that remote or temporary access of software from another jurisdiction would not disqualify an otherwise valid IDA sales tax exemption for software purchased as part of a project (*see* TSB-A-97[70]S; TSB-A-97[71]S). The link between the software and the vehicles clearly relates to the mobility of these items, allowing them to be located and used in more than one jurisdiction by virtue of their nature.

Thus, it is not the opportunity for mobility that is the subject restriction, but rather the actual location of the project or of the subject equipment purchased in conjunction with the project, that presents the problem. If the vehicles were located outside the municipality for whose benefit the agency was created, it was incumbent upon the agency to withhold financial assistance until the other municipalities involved consented. Had the vehicles been outside Monroe county on a temporary basis, for example, to acquire and transport other supplies and equipment to the project located in Monroe county, such temporary access would not disqualify petitioner's exemption. This concept of project boundaries to combat past abuses with industrial development agencies is consistent with the legislative support as set forth in the legislative bill jacket from 1993, submitted as part of the record in this case. Once the exemption is granted, for the law to be met, the location

of the vehicles, by virtue of their usage, is the central issue. That said, it was incumbent upon petitioner to prove that either the only location for the vehicles was within Monroe County, or if the location included other counties, that the other municipalities consented, absent usage that was merely temporary.

D. Petitioner's burden in this situation is a heavy one. Unfortunately, based on the record provided, petitioner did not carry its burden in this case to show that it remained entitled to the exemption it was originally granted, by evidence 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.

E. The petition of Elmer W. Davis, Inc. is denied and the Notice of Determination dated December 26, 2009 is hereby sustained.

DATED: Troy, New York
September 10, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE