

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
: **HENRIETTA BUILDING SUPPLIES, INC.** : DETERMINATION
: DTA NOS. 822268
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 December 1, 2004 through May 31, 2007. :
:

Petitioner, Henrietta Building Supplies, 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 December 1, 2004 through May 31, 2007.

On June 1, 2009, petitioner, by Harris Beach, PLLC (Marybeth Frantz, Esq., of counsel), and the Division of Taxation, by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by November 30, 2009, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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

The parties entered into a Stipulation of Facts with attached exhibits. The Stipulation of Facts and attached exhibits form the basis of the Finding of Facts herein. Additional findings of fact were also made.

1. Petitioner, Henrietta Building Supplies, Inc. (the Company), was, at all times during the audit period, a New York corporation. The company sold building supplies on the retail and wholesale level. During the period in issue, the company had locations in West Henrietta, New York, Buffalo, New York, and Erie, Pennsylvania.

2. Petitioner was appointed an agent of the County of Monroe Industrial Development Agency (COMIDA) on December 21, 2004, December 20, 2005 and on December 19, 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 letter dated December 21, 2004, from COMIDA to petitioner stated, among other things:

Pursuant to a resolution duly adopted on December 21, 2004, the County of Monroe Industrial Development Agency (the "Agency") appointed Henrietta Building Supplies Inc. (the "Company") the true and lawful agent of the Agency to assist in the purchase of a 2005 Sterling boom truck, office and yard equipment (the Project) to be used in connection with the existing facility located at 1 Riverton Way, West Henrietta, New York (the "Facility").

* * *

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 this 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.

3. A letter dated February 21, 2006 to petitioner's chief financial officer from the counsel for COMIDA stated, among other things, that pursuant to a resolution, dated December 20, 2005, petitioner was appointed as an agent of COMIDA "to assist in the purchase of trucks, to include a 2006 LT9513 Sterling Boom truck (the 'Project') to be used in connection with the existing facility located at 1 Riverton Way, West Henrietta, New York (the 'Facility'). The counsel for COMIDA also sent a letter to petitioner's chief financial officer, dated January 8, 2007, stating, in part, that COMIDA adopted a resolution on December 19, 2006 appointing petitioner to be the agent of COMIDA to assist in the purchase "of two 2007 Sterling boom trucks and equipment (the 'Project') for the Company, which is located at One Riverton Way, Rochester, New York (collectively with the Project, the 'Facility').

4. Petitioner purchased, in Monroe County, certain equipment and materials, including 11 trucks, which are at issue in this proceeding. At the time of their purchase, petitioner claimed an

exemption from sales tax on the basis that it purchased the motor vehicles as an agent of COMIDA, a tax exempt entity.

5. On or about June 12, 2007, the Division commenced an audit of petitioner. To the extent at issue in this matter, the Division examined petitioner's capital acquisitions for the period December 1, 2004 through May 31, 2007 and found that petitioner had purchased the 11 trucks and incurred repair expense upon which sales tax was not paid.

6. All of the trucks have traveled outside the jurisdictional boundaries of Monroe County and all of the trucks have intertransit licensing in order to travel outside of New York. Since their purchase, seven of the trucks were garaged at the company's place of business in Monroe County. The remaining four trucks were moved to Tonawanda, New York, which is a community near Buffalo, New York. None of the trucks at issue were ever leased to another entity.

7. The Division considered the purchase of the trucks subject to sales and use tax because they did not remain in Monroe County. The Division also assessed tax on the expense incurred for the repair of a truck. Accordingly, the Division issued a Notice of Determination to the Company, dated March 24, 2008 (Assessment No. L-029784303-6), which assessed sales and use tax in the amount of \$82,020.75, plus interest in the amount of \$16,260.34 for a balance due of \$98,251.09.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner does not contest the Division's method of determining the amount of sales tax which was assessed. Rather, petitioner challenges whether sales and use tax is due on the purchase of the trucks. According to petitioner, COMIDA appointed petitioner as its agent to undertake a particular project which included to purchase vehicles exempt from tax. Petitioner

maintains that the subsequent transfer of the vehicles from COMIDA to petitioner was also exempt from tax.

9. Petitioner submits that the advisory opinions relied upon by the Division regarding software are inapposite and, in addition, the term “use,” as such term is employed in the Tax Law, denotes more than a mere passing utilization. It is further argued that the term “removal” implies that an item is taken out of the jurisdiction permanently as opposed to temporary travel in a different location. Relying upon *Matter of Xerox v. State Tax Commn.* (71 AD2d 177 [3d Dept 1979]), petitioner posits that the vehicles have always been located and used in Monroe County for purposes of assessing sales and use tax. Petitioner further maintains that since an IDA has the authority to exempt purchases of tangible personal property that are movable by their nature, it is illogical that travel outside of an IDA’s jurisdiction would subject such purchases to sales or use tax.

10. Petitioner notes that General Municipal Law § 854(4) requires an IDA to obtain the consent of a neighboring jurisdiction to the extent that any portion of a project is “located” within the neighboring jurisdiction. According to petitioner, the Division has erroneously interpreted the word “located” to mean transient use. Petitioner further submits that this interpretation is contrary to legislative intent.

11. Petitioner posits that the Division’s position is a departure from past precedent insofar as it did not begin assessing sales tax on vehicles or other items of rolling stock based solely on the definition of “project” until 2006. However, the relevant definition of “project” became effective in 1993 leaving 13 years in which the Division did not contest or raise an issue with respect to IDA exemptions for rolling stock.

12. Lastly, petitioner maintains that the Division's interpretation of the General Municipal Law is not entitled to any deference because the Division does not have any specialized knowledge in this area of the law. Petitioner contends that the Division's interpretation of the General Municipal Law should be overruled because it is contrary to the public interest.

13. Initially, the Division submits that COMIDA's statutory authority to provide "financial assistance" for a project is limited. According to the Division:

COMIDA may not offer financial assistance for a project in the form of a sales tax exemption with respect to property which is intended to be used outside the territorial jurisdiction of Monroe County without the prior consent of every jurisdiction in which the property is used, and that jurisdiction must be continuous with Monroe County.

14. According to the Division, COMIDA does not have the statutory authority to grant sales tax exemptions for purchases that do not become part of the project because they can and will be used outside of Monroe County. As a corollary to this argument, the Division maintains that motor vehicles, by their nature, are capable of traveling outside of the jurisdiction of the IDA and are not entitled to the exemption. It is also noted that there is no evidence that another jurisdiction gave consent to the use of the vehicles. Further, there is no evidence that the other locations where the trucks were situated were contiguous to Monroe County.

15. The Division posits that petitioner's argument that the term "removal" implies a more permanent removal from a jurisdiction lacks any support. Further, this construction would make it impossible to determine the applicability of the exemption at the time of purchase. The Division also submits that petitioner's reliance upon *Matter of Xerox v. State Tax Commn.* (71 AD2d 177 [3d Dept 1979]) is misplaced; that the Division's position is not a recent interpretation or change in policy; that petitioner has the burden of proving that it is entitled to an exemption; and that public interest is promoted by fairness and equitable treatment.

16. In a reply brief, the petitioner reiterates its argument that it was entitled to purchase the vehicles exempt from sales tax and that the vehicles should remain exempt from tax. In addition to the arguments previously mentioned, petitioner questions the Division's position that motor vehicles have no natural situs. It is maintained that since the vehicles are garaged in Monroe County, no sales tax is due. Petitioner posits that since sales and use taxes are properly payable only in the county of garaging or primary use, COMIDA is able to exempt items, including vehicles, from sales and use taxes without affecting any other jurisdiction other than the one in which it operates.

17. Petitioner submits that any use of the vehicles outside of Monroe County was limited and temporary. According to petitioner, after any such travel outside of Monroe County, the vehicles would return to petitioner's place of business in Henrietta, New York. Contrary to the Division's position in its brief, petitioner asserts that the term "use" is a term of art in the Tax Law and that petitioner did not use the vehicles in a taxable sense outside of Monroe County. In the remainder of its brief, petitioner contends: that the interpretation of General Municipal Law § 854 is recent, unreasonable and not supported by the language of the statute or legislative history; that the Division has not consistently interpreted General Municipal Law § 854 consistently; and that the Division is not entitled to deference in its reading of General Municipal Law § 854.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax upon the receipts of every retail sale of tangible personal property except as otherwise provided. Thus, unless the motor vehicles are exempt from tax, sales and use tax was properly imposed on these purchases.

B. An exemption for governmental agencies, which would usually include an IDA, is set forth in section 1116(a)(1) of the Tax Law. 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* (Emphasis added.)

In addition to the foregoing, General Municipal Law § 874(1) provides that an industrial development agency “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.” General Municipal Law § 874(2) further provides that the property of the agency is exempt from taxation. This exemption includes private developers acting as the IDA’s agent for purposes of the project (*see Matter of Wegmans’s Food Mkts. v. New York State Dept. of Taxation & Finance*, 126 Misc 2d 144, *affd* 115 AD2d 962, *lv denied* 67 NY2d 606 [1986]).

C. Article 18-A of the General Municipal Law reveals a design of creating tax exemptions upon property owned by an IDA as well as upon property it “controls” or “supervises” or upon “its activities” General Municipal Law § 874 [1]; *Matter of Wegmans*). The purpose of industrial development agencies is set forth in General Municipal Law § 858 which states, in part, as follows:

The purpose of the agency shall be 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 the recreation opportunities, prosperity and standard of living

D. IDA's provide assistance in the completion of "projects" which are defined, in part, by General Municipal Law § 854(former[4]) as follows:¹

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. . . .

On its face, the definition of a project as set forth in General Municipal Law § 854 (former [4]) is clearly broad enough to include motor vehicles. The definition of a project includes equipment deemed necessary or desirable for which the agency was created. The term "equipment," in turn, is defined in Webster's Ninth New Collegiate Dictionary (9th ed 2007), in part, as follows: "1a: the set of articles or physical resources serving to equip a person or thing: as (1) the implements used in an operation or activity: apparatus (2): all the fixed assets other than land and buildings of a business enterprise. . . ." It is clear from the foregoing definition that motor vehicles are included in the definition of the term equipment as used in General Municipal Law § 854(former [4]) and that the acquisition of a motor vehicle may constitute a project.

E. In view of the foregoing, petitioner's argument regarding whether the Division's position represents a change in policy is academic and will not be addressed.

F. A different analysis is required with respect to the denial of the exemption because the items were used outside of Monroe County. General Municipal Law § 854 (former [4]) states, in part, that:

¹ The definition of the term project in General Municipal Law § 854(former[4]) was repealed effective January 31, 2008. The discussion herein is based on the definition of "project" which was in effect at the times relevant to this matter.

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 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.

Here, there is no evidence that petitioner obtained the consent of any other governing body where the items were used. Nor did petitioner present any evidence to show that this requirement is inapplicable. Under these circumstances, it is concluded that the Division properly denied the sales tax exemption because the items which were used outside of Monroe County.

G. In reaching the foregoing conclusion, it is noted that petitioner's reliance upon *Matter of Xerox v. State Tax Commn.* is misplaced. That matter did not involve the statutory requirements imposed by General Municipal Law § 854(former [4]) and is therefore inapposite. It is clear from the language of General Municipal Law § 854(former [4]) that the location of where the vehicle is garaged is not determinative of the incidence of taxation. As argued by the Division, 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.

H. Petitioner argues that the Division's reasoning is flawed because it equates the term "located" in General Municipal Law § 854(former [4]) with the term "used" in Tax Law § 1101(b)(7). According to petitioner, the term "located" implies a more permanent removal than the term "used." As set forth in the Division's brief, there is no authority for petitioner's position, since the Tax Law and the General Municipal Law in this area concern the same topic and should be read in pari materia. The term "use" in Tax Law § 1101(b)(7) is defined as the exercise of any right or power over tangible personal property. If a piece of equipment or item is located in a particular jurisdiction, it has, as a practical matter, been used in that jurisdiction. In

this context, the difference in terms is without meaning and rejected. In addition, petitioner's proposed construction of General Municipal Law § 854(former [4]) would be contrary to the well-settled maxim that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal*, 167 AD2d 767, 563 NYS2d 324 [3d Dept 1990]).

I. The petition of Henrietta Building Supplies, Inc. is denied and the Notice of Determination, dated October 9, 2008 is sustained together with such interest as may be lawfully due.

DATED: Troy, New York
May 27, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE