STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN ROCK SALT COMPANY LLC	:	DETERMINATION DTA NO. 822280
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 June 1, 2002 through November 30, 2005.	:	

Petitioner, American Rock Salt Company LLC, 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 June 1, 2002 through November 30, 2005.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 27, 2009 at 10:30 A.M., with all briefs to be submitted by January 27, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Harris Beach, PLLC (Charles Schachter, Esq., and Marybeth E. Frantz, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert Maslyn, Esq., of counsel).

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 the purchase of mining equipment and the leasing of railcars.

FINDINGS OF FACT

1. Petitioner, American Rock Salt Company LLC (American Rock Salt), was a corporation located in the Town of Groveland, Livingston County, New York. It engaged in the business of mining, sales and delivery of salt.

2. On March 25, 1996, the Livingston County Industrial Development Agency (LCIDA) appointed Akzo Nobel Salt, Inc. (Akzo Nobel) as its agent to undertake a project of completing a mine. A 1996 resolution of the LCIDA describes the project as consisting of :

> the construction and equipping (on certain land in Groveland, Livingston County) of surface support facilities for a new underground mine with 2 shafts, hoisting, screening, packaging and truck/rail shipping facilities to be used for the production, support, distribution and transportation of rock salt throughout the northeastern part of the United States, including the following as they relate to the acquisition, construction and equipping of such building(s) . . . all purchases, leases, rentals and other uses of tools, machinery and equipment in connection with the acquisition, construction and equipping . . . [the facility].

3. Petitioner purchased the mine from Akzo Nobel and submitted an amended and restated application to LCIDA, dated October 4, 1997, for financial assistance as successor in interest to Akzo Nobel. The application stated that the project site was 120 acres with 9,000 acres of mineral rights. Further, buildings would be acquired or constructed for "commercial salt mine production with surface support facilities for storage, loading [and] transport." The equipment to be acquired included underground mining equipment, underground and surface material handling equipment, underground processing equipment, hoists for personnel and production and truck and loadout equipment. Petitioner indicated that from the time it received the notice to proceed, it would take two years to complete construction plus an additional three years to reach full production.

4. On October 22, 1997, LCIDA adopted a resolution approving the assignment of the project from Akzo Nobel to petitioner, as successor in interest to Akzo Nobel, as its agent for the purpose of acquiring, constructing and equipping the facility. During this meeting, LCIDA's attorney opined that the then recent amendments of the law affecting IDAs were not applicable to petitioner's projects since the law went into effect on October 20, 1997. On the same day, LCIDA and petitioner executed an Inducement Agreement wherein LCIDA acknowledged that petitioner's application, of October 4, 1997, was an amendment and restatement of the application previously submitted by Akzo Nobel and also acknowledged its approval of the assignment of the mine project from Akzo Noble to petitioner. The project to which petitioner was appointed was similar to the original project with Akzo Nobel. However, when petitioner became involved, the project was expanded to include underground improvements.

5. The project description described in LCIDA's resolution of October 22, 1997 and the Inducement Agreement included:

> (i) all purchases, leases, rentals and other tools, machinery and equipment in connection with the acquisition, construction and equipping, and (ii) purchases, rentals, uses or consumption of supplies, materials and services of every kind and description used in connection with the acquisition, construction and equipping and (iii) all purchases, leases, rentals and uses of equipment, machinery, and other tangible property (including installation costs with respect thereto), installed or placed in, upon or under any surface or underground improvements.

6. The New York State Department of Environmental Conservation approved the transfer of the permits previously held by Akzo Nobel to petitioner.

7. On June 5, 1998, LCIDA adopted a resolution authorizing, among other things, the execution of a lease agreement, payment in lieu of tax agreement, mortgage and security agreement relating to the project. On or about October 26, 1998, LCIDA and petitioner executed a Lease Agreement, dated as of September 1, 1998. Section 4.1 of the Lease Agreement stated:

> The Agency hereby appoints [petitioner] its true and lawful agent, and [petitioner] hereby accepts such agency (i) to acquire, construct and equip the Facility in accordance with the Plans and Specifications, (ii) to make, execute, acknowledge and deliver any contracts, orders, receipts, writings and instructions with any other Persons, and in general to do all things with may be requisite or proper, all for constructing the Improvements and acquiring and installing the Equipment with the same powers and with the same validity as the Agency could do as if acting on its own behalf.

8. Petitioner commenced the completion of the project and LCIDA issued a sales tax exemption letter, dated October 26, 1998, enabling petitioner to make purchases for the project exempt from tax. The sales tax exemption letter stated:

> This appointment includes, and this letter evidences, 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: (1) all purchases, leases, rentals, and other uses of tools, machinery and equipment in connection with construction and equipping, (2) all purchases, rentals, uses or consumption of supplies, materials, utilities and services of every kind and description used in connection with construction and equipping and (3) 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.

9. On October 26, 1998, the LCIDA also sent a letter to petitioner stating, in part, that pursuant to a resolution of the LCIDA adopted on October 22, 1997, the LCIDA appointed petitioner as the lawful agent of the LCIDA:

> to acquire, construct and equip surface support facilities for a new underground salt mine with two shafts, hoisting, screening, packing and truck/rail shipping facilities to be used for the production, support, distribution and transportation of rock salt throughout the northeaster part of the United States . . . .

10. The forgoing letter further explained that the agency was limited to the facility and would expire upon the completion date of the facility as defined by the Lease Agreement dated September 1, 1998. Section 4.3, in turn, of the Lease Agreement, stated:

> To establish the Completion Date, [petitioner] shall deliver to [LCIDA] and the Lenders a certificate signed by an Authorized Representative of [petitioner] (i) stating that acquisition, construction and equipping of the Facility has been completed in accordance with the Plans and Specifications therefore; (ii) stating that the payment of all labor, services, materials and supplies used in acquisition has been made or provided for; and (iii) such certificates as may be satisfactory to the Lenders, including without limitation, a final certificate of occupancy, if applicable. The Company agrees to complete the acquisition, construction and equipping of the Facility on or before December 31, 2001.

11. A certificate establishing a completion date was never delivered during the audit period.

12. On August 30, 2000, LCIDA and petitioner entered into an Amendment to Lease Agreement which broadened petitioner's agency appointment to include the acquisition of "600 Rail Cars manufactured by Trinity Industries, which is the subject of a lease agreement between Railcar Amrock Trust, and the Company as agent for the Agency." Shortly before the hearing in this matter, petitioner found a copy of a signed form ST-60 for the expanded project and believes that it filed this form with the Division.

13. In connection with August 2000 amendment to the Lease Agreement, petitioner issued an additional sales tax exemption letter, dated August 30, 2000, which stated, in part:

> The Company desires to enter into a certain lease with Railcar Amrock Trust (the "Trust") as agent for the Agency (the "Railcar Lease") with respect to 600 rail cars manufactured by Trinity Industries, Inc. (The "Rail Cars"). The Railcar Lease contains an option to acquire the Rail Cars at the end of the lease term. The lease option extends beyond the termination date of the Sales Tax Exemption Letter. In order to provide a sales and compensating use tax exemption to the Company with respect to the leasing and/or acquisition of the Rail Cars, the Agency has issued this letter to supplement the Sales Tax Exemption Letter.

14. The railcars are used to transport the salt products to stockpile locations throughout the United States. When they are not in use, they are stored at the Hampton Corners facility or the

Retsof facility in Livingston County. The railcars are tracked and are not stored in other locations.

15. The lease of the railcars expires in 2015. Without the amendment in 2000, including the exemption letter in 2000, the existing sales tax exemption letter would not have been sufficient to provide an exemption of the railcars past the completion date of the mine because the completion date of the project was 2005 and the lease of the railcars continued for 10 more years.

16. On December 17, 2001, the Town of Groveland issued certificates of compliance for the service shaft, production shaft, pump house, electric control building, production head frame, service head frame and pump house. It also issued certificates of occupancy for the additive building and an electric fan house. As of this date, there were additional portions of the facility contemplated by LCIDA's resolution of October 22, 1997 and the Lease Agreement that were not completed such as the dry house, the administration building where the production workers would go in and prepare themselves to work underground and the truck loadout facility. There was also no reference to the machinery needed below-ground to bring up the salt. Thus, the certificates of completion and the certificates of compliance did not apply to the entire project.

17. As of December 2001, the mine yards and other areas that are necessary to maintain a sustainable level of tonnage that meets the company's costs had not been completed. Other areas that are needed to produce salt include a production bin to bring up the salt, a surge bin where the conveyers merge and the salt would be gathered for processing and a gallery where the salt is processed. In addition, each yard needs substantial equipment including two very large loaders, known as LHD's, as well as a road header, a cutter, a drill, a cleanup loader and a feeder

breaker.[1] In 2001, petitioner would have just started its first yard. Sustainable production was reached in 2005 when the fifth yard was completed. The completion of the fifth mine permitted the mine to engage in continuous operation.

18. On May 1, 2006, the LCIDA issued a sales tax exemption letter, expiring May 1, 2007, in order to effectuate an extension of the LCIDA's original appointment of petitioner as its agent on March 25, 1996. This letter was necessary because once the project was completed in November 2005, the original sales tax exemption provided by the LCIDA was no longer applicable. Therefore, a new sales tax exemption letter was needed.

19. On February 17, 2005, the Division sent a letter to petitioner scheduling a field audit of petitioner's sales and use tax records on March 21, 2005 for the period June 1, 2002 through February 28, 2005. The letter explained that "[a]ll books and records pertaining to the sales and use tax liability for the audit period, must be available on the appointment date." On the basis of the audit, the Division concluded that the following adjustments were warranted:

a. Pursuant to a test period agreement, there was a test of sales and as a result, the Division concluded that additional tax was due in the amount of $163.26 because sales tax was not paid on the storage fees on salt. The Division regarded this portion of the assessment as unsubstantiated exempt sales.

b. Capital acquisitions were reviewed in detail for the entire audit period. The Division found a number of items, such as servers, computers, time clocks, a generator and printers, that were purchased without the payment of tax. The Division concluded that additional sales and use tax was due in the amount of $31,579.22.

---

[1] After large rocks of salt are broken away from the face, they are placed in a feeder breaker.

c. The Division reviewed expense purchases for the period January 1, 2005 through September 20, 2005 and concluded that tax was due in the following areas:

i. The Division's review of general office supplies and equipment for the test period led the Division to conclude that there was additional liability of $37,169.39, which, when projected over the audit period, resulted in tax due of $154,847.79.

ii. The Division reviewed electrical parts and repairs invoices and found that additional tax was due during the test period in the amount of $2,007.61. This amount was projected over the audit period resulting in tax due of $8,426.71.

iii. The Division reviewed miscellaneous expense purchases for parts and found that tax was due for the audit period in the amount of $24,587.78.

iv. The Division reviewed an area described in the audit report as "2005 railroad." This category included expenses incurred for the leasing of railcars as well as numerous types of purchases such as repair and maintenance. The Division reviewed invoices that did not separately charge material cost and labor and therefore imposed tax on the entire charge. It also assessed tax on the software component of a "RailConnect" system that petitioner used to help track the location of railcars. The total amount of tax assessed in this area was $413,572.01.

v. The Division reviewed invoices pertaining to car and truck parts to determine if there was a production or manufacturing exemption. In certain instances, the Division agreed that an exemption was appropriate. The tax due on this item for the entire audit period was $5,939.74.

vi. The Division reviewed utility purchases for the period January 1, 2004 through May 31, 2005 because this period was viewed as representative of petitioner's business activity. The Division concluded that there were additional taxable purchases of $590,790.18 for electricity and gas that were not used in production resulting in additional tax due of $48,740.19.

20. During the audit, the Division concluded that the IDA agency appointment had expired on December 31, 2001, which was prior to the audit period. The Division found support for this position after it reviewed certificates of compliance and certificates of occupancy from the Town of Groveland. The Division believed that the Lease Agreement also supported its position. The Division recognized that the agency had been extended on August 30, 2000, but this was only for the lease of railroad rolling stock, and the Division did not consider this extension effective because it did not believe that the agency exemption applied to rolling stock. The Division began assessing tax on rolling stock, such as railroad cars or motor vehicles, in 2005 or 2006. In the course of reviewing documents, the auditor did not see any invoices where the invoice listed petitioner as an agent for the Livingston County IDA.

21. Through a series of documents, petitioner consented to an extension of time in which the Division could assess tax for the period June 1, 2002 through November 30, 2003 to December 20, 2006.

22. The Division issued a Notice of Determination (Assessment# L-027967526), dated November 27, 2006, which assessed sales and use taxes in the amount of $687,856.16, plus interest, for a balance due of $844,773.76 for the period June 1, 2002 through November 30, 2005. At a conciliation conference before the Bureau of Conciliation and Mediation Services, petitioner submitted information or documentation that resulted in adjustments to the notice. Additional adjustments were made to the notice after the conference. At the time of the hearing, the final amount of tax in issue was $451,492.34.[2]

[2] The Division agrees that petitioner is due a refund in the amount of $39,782.47. However, this claim pertains to a subsequent audit, which is currently on hold pending the resolution of the audit in this matter.

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 purchase of the mining equipment or the lease of the railway cars was 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. . . .

C. 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]).

D. On the basis of the Lease Agreement, the Division maintains that the agency relationship expired on December 31, 2001. The Division contends that the first day of the audit period was June 1, 2002, which was after the completion date set forth in the Lease Agreement. Therefore, the first question presented is when petitioner's status as an agent of LCIDA expired

and whether petitioner was permitted to purchase the mine equipment exempt from sales tax. The record shows that on March 25, 1996, LCIDA appointed Akzo Nobel as its agent to undertake the project of completing a mine. Thereafter, Akzo Nobel's status as an agent was transferred to petitioner in order to carry out the same project. In October 1998, the parties formally recognized this transfer and set forth the mutual obligations of the parties in a Lease Agreement. As set forth above, section 4.3 of the Lease Agreement states:

> To establish the Completion Date, [petitioner] shall deliver to [LCIDA] and the Lenders a certificate signed by an Authorized Representative of [petitioner] (i) stating that acquisition, construction and equipping of the Facility has been completed in accordance with the Plans and Specifications therefore, (ii) stating that the payment of all labor, services, materials and supplies used in acquisition has been made or provided for; and (iii) such certificates as may be satisfactory to the Lenders, including without limitation, a final certificate of occupancy, if applicable. The Company agrees to complete the acquisition, construction and equipping of the Facility on or before December 31, 2001.

E. It is clear that the Division's reliance upon the Lease Agreement to show that the agency appointment was not in effect is flawed. The establishment of the completion date, through the delivery of a certificate with certain representations, did not take place during the audit period. Thus, on its face, a completion date was not established.

Unquestionably, the agreement explicitly states that petitioner agreed to complete the acquisition, construction and equipping of the facility by December 31, 2001. However, as argued by petitioner in its brief, the December 31, 2001 date is merely a contractual covenant. At most, the failure to meet this date would give rise to a default and there is no evidence that the LCIDA took any steps in this direction. Moreover, there is no reason to conclude that the failure to meet the December 31, 2001 completion date would result in an automatic termination of petitioner's agency status with the IDA. Neither the 1998 sales tax exemption letter nor the

Lease Agreement contains a provision that the failure to complete the facility by December 31, 2001 would result in the forfeiture of petitioner's status as an agent of the IDA.

F. Petitioner has also correctly noted that the Division's reliance upon the Town of Groveland's certificates of compliance and certificates of occupancy to establish the completion date is misplaced. The Lease Agreement requires a certificate of completion to establish completion of the facility. The Lease Agreement does not contain any reference to certificates of compliance and certificates of occupancy. In its brief, the Division argued that petitioner failed to provide any other town certifications for other work performed after December 31, 2001. However, this argument lacks merit because it is clear that town certificates were not required by any of the documents executed between petitioner and the IDA in order to establish when the project was completed. Furthermore, there has been no showing that the Town of Groveland issues certificates of compliance or certificates of completion for those portions of the project that were constructed below the surface.

G. Petitioner's position that the project was not completed until sustainable production was achieved is supported by the record. Petitioner's 1997 application to the LCIDA clearly stated that it would take two years to complete production plus an additional three years to reach full production. While these time parameters are estimates, it lends credence to petitioner's contention that it was understood that the project would not be completed by December 2001. The testimony offered by petitioner's chief financial officer that the project was not completed until 2005 is also supported by the fact that petitioner did not seek additional financial assistance until May of 2006.[3] As petitioner notes, it would be completely illogical for petitioner to wait

[3] The Division has argued that the testimony of petitioner's chief financial officer on certain matters is entitled to little weight because she did not begin working for petitioner until 2006. In my opinion, Ms. Blake's testimony is entitled to be given weight because it is consistent with the documents in the record and because her

nearly five years for additional financial assistance for its purchases for the growth and expansion of the facility if petitioner's project had terminated in 2001.

Therefore, the Division's argument that the 2006 sales tax exemption letter was an after the fact attempt to reactivate the agency appointment from its expiration on December 31, 2001 and extend it until May 1, 2007 is rejected because it is without merit. Contrary to the Division's argument, the sales tax exemption letter of 2006 corroborates petitioner's version of the sequence of events.

H. The Division argues that petitioner failed to comply with the requirements of being an agent. The Division contends that commencing October 19, 1997, an agent was required to file Form ST-60 within 30 days of its appointment. It is submitted that Form ST-60 was not filed by petitioner in connection with its appointment in 1997. The Division further notes that during the audit in 2007, petitioner submitted a Form ST-60 listing its appointment date as January 1, 2001. The Division posits that, to have been timely, this form would have had to have been filed by February 1, 2001. It is acknowledged by the Division that the failure to file the form may not have a punitive sanction but, it submits that the failure to file the Form ST-60 is evidence that petitioner ignored the terms of the agency relationship and, according to the Division, a "tacit acknowledgment" that the prior agency relationship had expired on December 31, 2001. The Division also contends that petitioner's failure to comply with the requirements of being an agent is also evidenced by the fact that petitioner did not file any ST-340 forms with the Division.

I. In response, petitioner submits that it complied with the legal requirements of being an agent. Petitioner notes that Akzo Nobel's agency status was transferred to petitioner as the

---

position required that she familiarize herself with the basis of the exemptions that American Rock Salt was claiming.

successor in interest to Akzo Nobel to undertake the same project. According to petitioner, the LCIDA effectively appointed petitioner on March 25, 1996, the date Akzo Nobel was originally appointed as an agent for the project. Petitioner submits that since the effective date of petitioner's predecessor in interest's agency appointment precedes the requirement to file a Form ST-60, the form was not required. In addition, the statement from the IDA's attorney that a Form ST-60 was not required, supports the conclusion that there was a good faith belief by the LCIDA and petitioner that such form was not required.

J. With respect to the claim by the Division that petitioner did not file forms ST-340, petitioner submits that this issue was raised for the first time at the hearing. Petitioner notes that when the witness for the Division was questioned on this point, he stated that he thought that the Division was referring to a Form ST-60. As a result of this response and the fact that the filing of Form ST-340 had not been raised previously, petitioner did not pursue this matter. Petitioner contends that, in fact, it filed forms ST-340 for the years in issue.

K. General Municipal Law § 874(9) required an IDA to notify the Division each time the IDA appointed an agent for the purpose of extending the sales and use tax exemptions. The Form ST-60 states that the notification must be made within 30 days of the appointment on Form ST-60. This requirement only applies to agents or operators appointed on or after October 19, 1997 (TSB-97[11]S).

L. Petitioner's argument that its appointment predated the requirement of filing a Form ST-60 is rejected. There is no question that petitioner's predecessor's appointment was prior to the effective date of the act. However, regardless of the Lease Agreement's characterization of petitioner as a successor in interest, it is clear that petitioner was a new agent of the LCIDA and,

as such, the appropriate steps should have been taken to file the appropriate forms in the prescribed manner.

Despite the foregoing conclusion, the Division's argument that petitioner ignored the obligations of its agency status is rejected. First, the Division's brief explicitly acknowledges that there is no punitive sanction for the failure to file a form ST-60. Second, the record shows that the LCIDA received advice from its attorney that the Form ST-60 was not required.[4] Under these circumstances, the decision not to file a Form ST-60 was reasonable.

M. The Division also contends that the failure to file the Form ST-340 also shows that petitioner ignored its obligations as an agent. A Form ST-340 is an annual statement by an agent reporting use of the sales tax exemption authority (General Municipal Law § 874[8]; 20 NYCRR 542.1). In this matter, the Division's witness on direct examination stated that he never saw any record of any report of the use of an exemption. However, when questioned on cross-examination about the filing of Form ST-340, the same witness stated that he was talking about the Form ST-60. Further, in its brief, petitioner asserts that it filed Form ST-340 for the years in issue and that it did not enter copies of the forms into evidence because it had not been raised until the hearing. Under the circumstances, it is concluded that the record is not clear on this point and, therefore, not sufficiently developed to support the Division's argument.

N. The Division submits that TSB-M-87(7)S requires that invoices for sales claimed as exempt must identify the project and show that the purchaser was an IDA or an agent for an IDA. TSB-M-87(7)S states, in pertinent part:

---

[4] An additional difficulty with the argument that the failure to file a Form ST-60 shows that petitioner ignored its obligations as an agent is that the obligation to file this form is upon the IDA and not upon the agent (General Municipal Law § 874[9]; ***see*** TSB[M] - 97[11]).

> Contractors and others (purchasers) appointed as agents for the IDA should obtain a letter from the IDA written on IDA letterhead, signed by a responsible officer of the IDA and containing a statement identifying the contract, the project, and the purchaser, and authorizing the purchaser to make purchases for the project as agent for the IDA. When making purchases as an agent, the purchaser need only provide the supplier with a copy of this letter to establish the exemption. The supplier must identify the project on each bill and invoice for such purchases and indicate on the bill or invoice that the IDA or agent for the IDA was the purchaser.

It is clear from the forgoing that regardless of any obligation that may be imposed upon the supplier, petitioner was only required to supply a copy of the sales tax exemption letter and, this obligation was satisfied. Therefore, any failure to make such a statement does not affect the validity of the IDA exemption for petitioner's purchases of mine equipment.

O. On the basis of the forgoing, it is concluded that petitioner's purchases of mining equipment were exempt from the imposition of sales and use tax.

P. The remaining issue is whether the lease of the railcars was exempt from sales and use tax. The Division maintains that property such as locomotives and railroad cars that are readily capable of travel outside the jurisdictional boundaries of the IDA are not subject to the exemption from sales tax. IDA's provide assistance in the completion of "projects" which are defined, in part, by General Municipal Law § 854(former[4]) as follows:[5]

> 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. . . .

---

[5] 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.

Q. On its face, the definition of a project as set forth in General Municipal Law § 854(former [4]) is clearly broad enough to include railcars. The definition of a project includes equipment deemed necessary or desirable for the purpose for which the agency was created, and this, in turn, would include the railcars. In view of the forgoing, petitioner's argument regarding whether the Division's position represents a change in policy is academic and will not be addressed.

R. A different analysis is required with respect to the denial of the exemption because the items were used outside of Livingston County. General Municipal Law § 854 (former [4]) 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. 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.

Petitioner argues that the word "located" as set forth above implies a more permanent removal as opposed to a temporary use. This argument is rejected because the term "use" as defined in Tax Law § 1101(b)(7) does not contain a time element. Therefore, the Division's interpretation of "located," as including a temporary use, is adopted because it is consistent with the Tax Law's definition of use .

It is undisputed that the railcars travel to various locations throughout the United States where petitioner's stockpiles are located. Further, there is no evidence that petitioner obtained the consent of any other governing body where the items were used. As argued by the Division in its brief, the IDA may not offer financial assistance for a project in the form of a sales tax exemption for property that is intended to be used outside of Livingston County without the prior

consent of the jurisdiction in which the property is used and that jurisdiction must be contiguous with Livingston County (General Municipal Law § 854 [former (4)]). Since the IDA is limited in its authority to provide financial assistance, petitioner, as an agent, is similarly limited. As petitioner has not shown that the conditions in the General Municipal Law have been satisfied, it has not established that it is entitled to an exemption on the leasing of the railcars.

S. Petitioner's reliance upon legislative history to support its position is misplaced. Statutory rules of construction provide that "[t]he 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 statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120).

T. In reaching the foregoing conclusion, it is noted that petitioner's reliance upon ***Matter of Xerox v. State Tax Commn.*** (71 AD2d 177, 422 NYS2d 493 [1979]) 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.

U. The petition of American Rock Salt Company LLC is granted to the extent of Conclusion of Law O and the Division is directed to modify the Notice of Determination, dated

November 27, 2006, accordingly; except as so granted, the petition is otherwise denied and the notice is sustained together with such interest as is lawfully due.

DATED: Troy, New York
July 22, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE