

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

UPSTATE ROOFING & PAINTING, 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 Period March 1, 2005 through :
August 31, 2005. :

In the Matter of the Petition :

of :

DAVID PASTORE :

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 March 1, 2005 through :
August 31, 2005. :

DETERMINATION
DTA NOS. 822482,
822483, 822484 AND
822485

In the Matter of the Petition :

of :

ROBERT MORGAN :

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 March 1, 2005 through :
August 31, 2005. :

In the Matter of the Petition	:
of	:
KIMBERLY ELLIOTT	:
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 March 1, 2005 through	:
August 31, 2005.	:

Petitioners, Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2005 through August 31, 2005.

On April 3, 2009 and April 9, 2009, respectively, petitioners, by their representative, Marybeth E. Frantz, Esq., and the Division of Taxation, by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by August 3, 2009, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the purchases of a crane and a service truck were exempt from sales and use taxes pursuant to Tax Law § 1116 (a)(1) and General Municipal Law § 874(1).

FINDINGS OF FACT

1. Following an audit the Division of Taxation (Division) issued to petitioners, Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott, notices of

determination, each of which asserted \$15,118.48 in additional sales tax due, plus interest, for the period March 1, 2005 through August 31, 2005.¹

2. Petitioners Pastore, Morgan and Elliott were assessed as responsible officers of petitioner Upstate Roofing pursuant to Tax Law §1131(1) and §1133(a). These petitioners acknowledge their status as officers of Upstate Roofing and do not contest their status as persons responsible to collect tax under Tax Law §1131(1).

3. Petitioner Upstate Roofing,² a New York corporation, is engaged in the business of installing, maintaining and repairing complex commercial roofing systems. Petitioner's business is located in Monroe County, New York.

4. Petitioner was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on February 15, 2005. The minutes of COMIDA's February 15, 2005 meeting indicate that petitioner "will be replacing four fleet vehicles."

5. In connection with this agency appointment, COMIDA issued to petitioner an appointment letter dated February 15, 2005 which provides, in relevant part as follows:

Pursuant to a resolution duly adopted on February 15, 2005, the County of Monroe Industrial Development Agency (the "Agency") appointed Upstate Roofing, Inc. (The "Company") the true and lawful agent of the Agency to assist in the purchase of four (4) service trucks and engineering software (the "Project") to be used in connection with the existing facility located at . . . Town of Henrietta, New York (the "Facility").

The agency created by this letter is limited to the Facility, of course, and will expire on February 15, 2006.

* * *

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

¹ The notice issued to Upstate Roofing was dated November 9, 2007. The notices issued to petitioners Pastor, Morgan and Elliott were dated November 13, 2007.

² Unless otherwise indicated, all references to petitioner refer to Upstate Roofing.

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; (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.

* * *

The State of New York provides in § 874 of the General Municipal Law that Industrial Development Agencies are exempt from property and sales tax. However, for the Company, as agent of the IDA, to properly obtain and utilize this tax-exempt status, there are certain steps that you must comply with.

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.

* * *

This letter is provided for the sole express purpose of securing exemption from New York State Sales Tax for this project only. No other principal/agent relationship is intended or may be implied or inferred by this letter.

6. The address for the “Facility” in the appointment letter is the address of petitioner’s place of business.

7. Petitioner subsequently purchased, in Monroe County, a service truck and a crane. Petitioner did not pay sales tax on these purchases. These vehicles are registered to be operated on the highways of the State of New York

8. On audit the Division determined that petitioner’s purchases of the service truck and crane were properly subject to sales tax. Upon review of the relevant invoices, the Division determined \$1,998.48 in tax due on the purchase of the service truck and \$13,120.00 in tax due

on the purchase of the crane for a total of \$15,118.48 in additional tax due as reflected in the notices of determination.

9. The service truck and the crane in question were garaged at petitioner's place of business at all times during the audit period.

10. On occasion the service truck and the crane, while in use as part of petitioner's business operations, temporarily left the jurisdictional boundaries of Monroe County.

11. All uses of the service truck were consistent with the description of the project as indicated in the February 15, 2005 appointment letter.

CONCLUSIONS OF LAW

A. Sales tax is imposed upon the receipts of every retail sale of tangible personal property except as otherwise provided (Tax Law § 1105[a]).

B. It is well settled that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (*see Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal*, 167 AD2d 767, 563 NYS2d 324 [3d Dept 1990]).

C. Tax Law § 1116 (a)(1) provides an exemption from sales and use taxes with respect to purchases or sales made by the State of New York, or any of its agencies, instrumentalities, or public corporations. Industrial development agencies are public corporations within the meaning of this provision (*see* 20 NYCRR 529.2[a][2]).

D. Additionally, 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." This exemption includes private developers acting as the IDA's agent for project purposes (*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]).

E. General Municipal Law § 858 defines the purposes of industrial development agencies, in relevant part, as follows:

[T]o 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

F. IDAs provide financial assistance, which includes sales tax exemptions (*see* General Municipal Law § 854[14]), in furtherance of the completion of “projects,” as defined, in relevant part, by General Municipal Law § 854(former [4]) as follows:³

“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

G. Petitioner’s purchase of the crane was properly subject to sales tax. There is no evidence in the record indicating that COMIDA authorized this purchase. The February 15, 2005 appointment letter notes petitioner’s appointment as agent of COMIDA “to assist in the purchase of four (4) service trucks and engineering software (the ‘Project’) to be used in connection with the existing facility.” The appointment letter makes no reference to the purchase of a crane. Similarly, the minutes of COMIDA’s February 15, 2005 meeting refer to the replacement of “four

³ 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.

fleet vehicles,” but make no reference to a crane. The record thus does not show that petitioner was acting as agent of COMIDA in purchasing the crane or that the purchase of a crane was part of any project. Under such circumstances, the exemption under Tax Law § 1116(a)(1) does not apply and the prohibition against taxing IDAs under General Municipal Law § 874(1) is not implicated.

H. Turning to the question of whether the purchase of the service truck was exempt from sales tax, General Municipal Law § 854(former [4]) restricts the authority of the IDA as follows:

[N]o 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.

I. Here, the service truck in question was occasionally used outside of Monroe County, i.e., the municipality for whose benefit COMIDA was created, and there is no indication that consent for such use was obtained from the governing bodies of such other municipalities. The question presented, therefore, is whether, by the occasional use of the truck outside Monroe County, the project in question was “located” partially outside Monroe County for purposes of General Municipal Law § 854(former [4]). If so, then given the absence of consent from any other municipalities, COMIDA lacked the authority to provide financial assistance to petitioner in the form of a sales tax exemption in respect of its purchase of the service truck and such purchase was properly subject to sales tax.

J. As indicated in the February 15, 2005 letter, the project, as relevant herein, consisted of the purchase of a service truck “to be used in connection with the existing facility.” The project was not, therefore, simply the purchase of an asset, but also the use of that asset in a specified

manner.⁴ If such use, or project activity, occasionally occurs in another municipality then, it is reasonable to conclude that the project is located partially in such other municipality. Here, the truck in question was always used in accordance with the February 15, 2005 letter and therefore always engaged in project activity as defined in the letter. Inasmuch as some of that use occurred outside Monroe County, the project at issue was located partially outside Monroe County for purposes of General Municipal Law § 854(former [4]). The purchase of the truck was therefore properly subject to tax.

K. Petitioner sought to distinguish between the location of the project and the use of the truck. Petitioner argued that “located” for purposes of General Municipal Law § 854(former [4]) means “established” which connotes a greater sense of permanence than “use.” Consistent with the above discussion, this argument is rejected. As noted, COMIDA defined the project as the purchase of a truck “to be used” in a certain manner. Given this definition, the specified use of the truck was the project and the location of that use must necessarily be the location of the project.

L. Petitioner also argued that, consistent with sales tax principles, the location of the project in this case should be determined by where the truck was purchased and is principally garaged. This argument is also rejected. The location of the project is best determined by reference to COMIDA’s definition of the project and petitioner’s use of the truck. That definition permits the use of the truck and therefore, the project, to occur outside of Monroe

⁴ Although the February 15, 2005 appointment letter contains the parenthetical “the ‘Project’” immediately following the clause “to assist in the purchase of four (4) service trucks and engineering software,” reading the sentence as a whole shows that the use of the purchased items “in connection with the existing facility” is a required element of the project. This interpretation is supported by the next sentence in the letter which provides, in relevant part: “The agency created by this letter is *limited to the Facility, of course*” (emphasis added).

County. Since petitioner occasionally used the truck outside of Monroe County, the project was partially located outside Monroe County.

M. Petitioner noted, correctly, that since the truck was purchased and garaged in Monroe County, COMIDA's sales tax exemption in this case affected only Monroe County. Petitioner asserted that since no tax revenue was lost by any other county, COMIDA was not required to obtain the consent of any other jurisdiction. Petitioner thus imposes a condition on the consent requirement of General Municipal Law § 854(former [4]). The language of that provision, however, does not impose such a condition. Considering that tax exemption statutes are strictly construed against the taxpayer (*see* Conclusion of Law B), petitioner's interpretation is rejected.

N. As may be inferred from the foregoing discussion, the Division's contention that the unique mobility of a motor vehicle precludes any sales tax exemption as part of an IDA project under General Municipal Law § 854(former [4]) is rejected. There is no statutory basis for this position. Consequently, petitioner's argument that this position constituted a change in Division policy is moot.

O. The petitions of Upstate Roofing & Painting, Inc., David Pastore, Robert Morgan and Kimberly Elliott are denied and the notices of determination dated November 9, 2007 and November 13, 2007 are sustained.

DATED: Troy, New York
January 21, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE