

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
THE CONKING AND CALABRESE CO., INC.	:	DETERMINATION
AND DONN J. CALABRESE	:	DTA NOS. 822727AND
	:	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.	:	

Petitioners, The Conking and Calabrese Co., Inc., and Donn J. Calabrese, 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 September 1, 2006 through November 30, 2006.

Petitioners, by their representatives, Michael J. Townsend, Esq., and Marybeth E. Frantz, Esq., and the Division of Taxation, by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by July 24, 2009, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

The parties have 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.

1. 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.

2. The Company was appointed agent of the County of Monroe Industrial Development Agency (COMIDA) on November 21, 2006 to assist in the purchase of a 2001 Sterling LT9513 boom truck (the Project or Facility).

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

4. 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.

5. 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.

6. 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.

7. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a), in relevant part, provides for the imposition of sales tax upon the “receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28].” Unless otherwise exempt, the purchase of the boom truck by petitioner The Conking and Calabrese Co., Inc., was properly subject to the imposition of sales tax.

B. Tax Law § 1116(a) provides, in relevant part, as follows:

any 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.)

C. The County of Monroe Industrial Development Agency (COMIDA) is a local Industrial Development Agency established under the authority of Article 18-A of the General Municipal Law. Generally, projects or facilities of an agent of an IDA are financed in whole or in part by the issuance of Industrial Development Bonds (IDBs) by the local IDA. Typically, an IDB-financed project is constructed and owned by the IDA and leased under a financing lease to a business enterprise. The terms of the financing lease essentially provide for payments which will amortize debt service on the bonds, and the business enterprise has the option to eventually purchase the project.

As the Court indicated in *Matter of Wegmans's Food Markets v. Department of Taxation & Finance of the State of New York* (126 Misc 2d 144 [1984], *affd* 115 AD2d 962 [1985], *lv denied* 67 NY2d 606 [1986] [*Wegmans I*]), Article 18-A contains throughout its provisions the purpose of establishing tax exemptions upon property owned by IDAs as well as upon property it “controls” or “supervises” and upon “its activities” (General Municipal Law §874[1]). According to the Court, the beneficial purpose of the legislation and the legislative intent are clearly expressed in section 852 of the General Municipal Law, which states:

It is hereby declared to be the policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop recreation, economically sound commerce and industry and economically sound projects . . . for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies and instrumentalities and to grant to such industrial development agencies the rights and powers provided in this article. . . .

The use of all such rights and powers is a public purpose essential to the public interest, and for which public funds may be expended.

In further support of its conclusion that the Legislature intended IDAs to be treated as governmental agencies, the Court looked to General Municipal Law § 858, which delineates the purposes and powers of an IDA, 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 their recreation opportunities, prosperity and standard of living

Based upon the above sections of the General Municipal Law, the Court in *Wegman's I* initially concluded that the Legislature intended that IDAs be treated as governmental agencies, excluding an IDA's purchase of personal property from the imposition of sales and use taxes. The Court, after reviewing what it considered to be the all-embracing definition of the term “project”

contained in section 854(4), concluded that the statute makes clear that it was the intention of the Legislature to include personal property in the tax exemption provided by the statute so long as the IDA owned, controlled or supervised it in connection with its activities. As a result, the Court held that such property is as much a part of a project or facility developed by an IDA as the real estate or buildings (*Wegmans's I*) and were included in the tax exemption provided by the statute.

D. Petitioner seeks to expand the holding in *Wegman's I* to include personal property which was not purchased as part of the development of real estate or buildings, was not included in a lease-back transaction with an IDA and which was never owned by an IDA. The boom truck purchased by petitioner was designated by COMIDA as the "project" or "facility." It is therefore necessary to determine if the purchase of personal property in these circumstances comes within the definition of "project" as that term is defined and used in the General Municipal Law.

E. General Municipal Law § 854(4) defines the term "project," in part, as follows:

any land, any building or other improvement, and all real and personal property 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, civic, commercial or industrial purposes . . . and which may include or mean an industrial pollution control facility, a recreation facility, educational or cultural facility, a horse racing facility, a railroad facility, a continuing care retirement community, or a civic facility

Statutes creating exemptions from tax are to be strictly construed (*see Matter of Grace v. New York State Tax Commn* , 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn* , 99 AD2d 867, 472 NYS2d 744 [1984], *affd* 64 NY2d 682, 485 NYS2d 526 [1984]). In addition, it

is well established that the interpretation given to a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (*Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman*, 62 NY2d 539, 478 NYS2d 846 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (*see Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1988]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (*see McKinney's Cons Laws of NY, Book 1, Statutes § 92*). As stated by the Court of Appeals in *Kurcsics v. Merchants Mut. Ins. Co.* (49 NY2d 451, 426 NYS2d 454 [1980]; *see also Matter of Stuckless*, Tax Appeals Tribunal, August 17, 2006), “Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency”

F. 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; *see Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 667 NYS2d 327 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture

so as to restrict or extend that meaning (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183, 470 NYS2d 791 [1983]).

G. The definition of the term “project” contained in General Municipal Law § 854 makes clear that projects are to include land, buildings or other improvements to land or buildings. Personal property is included in the term “project” only to the extent that the personal property is “deemed necessary or desirable” to the land, building or other improvements. Consistent with this conclusion are the phrases contained in section 854 that the project may be “in existence or under construction,” that the project “be suitable for manufacturing, research, commercial or industrial purposes” and that such project may include “an industrial pollution control facility, a recreation facility, educational or cultural facility, a horse racing facility, a railroad facility, a continuing care retirement community or a civic facility.”

In addition, General Municipal Law § 854(13) includes within the definition of “civic facility” a dormitory for educational institutions, facilities as defined in article 28 of the Public Health Law and housing facilities designed to be occupied by individuals 60 years of age or older. Public Health Law § 2801(1) and (2) refers to hospitals and nursing homes as facilities.

H. In further support that a project must include land, buildings or improvements thereon, the term “project” is defined, in part, as “a specific plan or design,” or “a planned undertaking” (Webster’s Ninth New Collegiate Dictionary 940 1989). The dictionary refers to the term “plan” as a synonym. Under the term “plan” the dictionary provides that the synonyms “plan, design, plot, scheme (and) project mean a method devised for making or doing something or achieving an end,” and that the word “project” often stresses imaginative scope and vision.”

The term “facility” is defined, in part, as “something (as a hospital) that is built, installed, or established to serve a particular purpose.”

I. Based on the clear and precise language of the statute, it is held that the Company’s purchase of the boom truck does not qualify as a project or facility as those terms are used in Article 18-A of the General Municipal Law, and does not qualify for the tax exemption provided for in section 874(1). Therefore, the notices of determination issued by the Division for the unpaid sales tax on such purchase were proper.

J. The petitions of The Conking and Calabrese Co., Inc. and Donn J. Calabrese are denied, and the notices of determination, dated November 10 and 11, 2008, are sustained.

Dated: Troy, New York
January 7, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE