

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JEFFERSON HOTEL ASSOCIATES LLC : DECISION
for Revision of a Determination or for Refund of Sales : DTA NO. 827618
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period August 21, 2012 through June 30, 2014. :

Petitioner, Jefferson Hotel Associates LLC, filed an exception to the determination of the Administrative Law Judge issued on August 16, 2018. Petitioner appeared by The Halpin Firm (Robert L. Halpin, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on December 28, 2018, the due date for petitioner's reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner, acting as an agent of an industrial development agency, received sales and use tax exemption benefits that were in excess of the amount authorized.

II. Whether petitioner has established that General Municipal Law § 875 (3) (b) does not

apply under the present circumstances and therefore cannot serve as the basis of an assessment seeking the recovery of any such excess benefits.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 3 and have added an additional finding of fact, numbered 19 herein. We have made these changes to include additional facts from the record.

1. Petitioner, Jefferson Hotel Associates LLC, is a New York limited liability company. On June 22, 2012, petitioner submitted an application for financial assistance to the County of Monroe Industrial Development Agency (COMIDA), in connection with petitioner's proposed construction of an 89-room Home2 Suites hotel facility to be located at 999 Jefferson Road in the Town of Henrietta, Monroe County (hotel project). Petitioner's application sought financial assistance for the hotel project in the form of a real property tax abatement, a mortgage recording tax exemption and a sales and use tax exemption.¹

2. The application required petitioner to estimate the costs of construction so as to classify those estimated costs that would, and would not, be subject to sales tax. Based upon petitioner's cost estimates, COMIDA estimated the sales tax exemption benefit for the hotel project at \$223,200.00.²

3. By resolutions adopted on August 21, 2012, COMIDA accepted petitioner's application, approved the appointment of petitioner as COMIDA's agent for purposes of the hotel project, and otherwise authorized and directed that the necessary agreements with petitioner

¹ For simplicity, sales and use taxes will be referred to, hereinafter, as sales tax.

² Dividing the \$223,200.00 estimated sales tax exemption benefit by the 8% combined State and local sales and use tax rate then in effect results in goods and services valued at \$2,790,000.00 being exempted from tax.

be executed so as to give effect to the sales tax and mortgage recording tax exemptions, and the real property tax abatement, regarding the hotel project. The resolutions authorize petitioner to make “all purchases” of “every kind” in connection with constructing and equipping the hotel project and contain no reference to a specific dollar limit to such purchases. The resolutions contain no reference to an expiration date for the hotel project or petitioner’s agency appointment.

4. On August 21, 2012, COMIDA issued to petitioner a sales tax appointment letter that, among other things, appointed petitioner as COMIDA’s agent for the hotel project, and in so doing, specifically authorized petitioner to make purchases and rentals of materials, equipment, supplies and services for the hotel project that were free of sales tax. Paragraph two of the August 21 appointment letter provided as follows:

“The COMIDA appointment created by this letter is limited to the Project, and will expire on **November 30, 2012**. This appointment letter may be extended by showing good cause. *Total costs of the project cannot exceed the project costs as detailed on the enclosed ST-60 form.*” (bold as in original, italics added).

5. The November 30, 2012 expiration date of petitioner’s appointment as COMIDA’s agent, specified above, was extended twice, as described more fully hereinafter. With each such extension, COMIDA issued to petitioner a new sales tax appointment letter. Each of such letters, dated December 1, 2012, and February 24, 2014, respectively, was identical to its predecessor letter. Each set forth the identical foregoing language in its second paragraph, save only for the revision amending the expiration date of petitioner’s agency appointment status by setting forth the new (revised) expiration date of such status.

6. With the initial designation of petitioner as its agent, COMIDA, as required, issued and filed with the Division of Taxation (Division) form ST-60 (IDA [industrial development agency]

appointment of project operator or agent), evidencing petitioner's appointment as COMIDA's agent for the hotel project. In turn, and as required, COMIDA issued and filed with the Division revised forms ST-60, dated December 1, 2012, and February 24, 2014, respectively, pursuant to which the initial November 30, 2012 expiration date of petitioner's appointment as agent was amended, revised and extended by COMIDA to February 28, 2014, and thereafter was amended, revised and extended to June 30, 2014.

7. Each of the three forms ST-60 filed by COMIDA required a "[d]escription of goods and services intended to be exempted from sales and use taxes" which description was completed by COMIDA as follows:

"Materials, equipment, services and other tangible personal property in connection with the construction and equipping of an approximately 53,585 square foot, 4-story hotel with 95 parking spaces, all located at 999 Jefferson Road in the Town of Henrietta, Monroe County, New York."

8. The initial form ST-60, dated August 21, 2012, reflected petitioner's designation as agent through November 30, 2012. The first revised form ST-60 (dated December 1, 2012), reflects COMIDA's extension of petitioner's designation as agent from December 1, 2012 to February 28, 2014. Each of these forms required the completion of a section setting forth the "[e]stimated value of goods and services to be exempted from sales and use taxes as a result of the project's designation as an IDA project." This section was completed by COMIDA, on each of such forms ST-60, as follows:

"Approximate Savings of \$223,200 (All Agents, All In)."³

³ It appears that COMIDA simply listed the dollar value of the sales tax exemption benefit itself, rather than the value of the goods and services being exempted from tax, as requested by the terms of form ST-60 (*see* finding of fact 2, n 2).

9. The second revised form ST-60, reflected COMIDA's extension of petitioner's designation as agent from March 1, 2014 to June 30, 2014. This second revised form ST-60 required the completion of two sections regarding the value of the sales tax exemption benefit.⁴ The first section required setting forth the "[e]stimated value of goods and services to be exempted from New York State and local sales and use taxes as a result of the project's designation as an IDA project." This section was completed as follows:

“\$2,790,000 (All Agents, All In).”

The second section required setting forth the “estimated value of New York State and local sales and use tax exemption provided.” This section was completed as follows:

“\$223,200 (All Agents, All In).”

10. Petitioner also filed with the Division, as required, form ST-340 (annual report of sales and use tax exemptions claimed by agent/project operator of industrial development agency/authority [IDA]), for each of the years 2013 and 2014. The amounts of sales tax exemption reported thereon were \$188,542.00 for 2013, and \$64,817.76 for 2014, totaling together \$253,359.76.⁵

11. On February 20, 2015, COMIDA issued a letter (demand letter) to petitioner referencing amendments to “certain provision of the General Municipal Law and the Public Authorities Law to reform the way Industrial Development Agencies allow sales tax exemption,”

⁴ The initial form ST-60 and the first revised form ST-60 each bear a form date of February 2011 (“[2/11]”) in the upper right corner. The second revised form ST-60 bears a form date of April 2013 (“[4/13]”) in the upper right corner, and differs from the initial forms ST-60 in that the later form (by using two sections) required both a listing of the dollar value of the goods and services to be exempted from tax and a listing of the consequent dollar value of the tax benefit itself to be realized from the tax exemption.

⁵ Dividing the combined \$253,359.76 amount of tax benefit reported on the forms ST-340, by the 8% tax rate, results in goods and services purchased in the amount of \$3,166,977.00. This amount exceeds the estimated value of such goods and services by some \$376,977.00. It is the \$30,158.00 of sales tax computed on this latter amount that is sought to be recovered herein.

which amendments became effective March 28, 2013. This letter states that, based on the forms ST-340 filed by petitioner, “the [hotel project] took in excess of the amount authorized under the ST-60. New York State requires COMIDA to recapture the amount of excess sales tax exemption taken and remit it to New York State and affected taxing jurisdictions within 30 days of this notification.” The demand letter sought payment in the amount of \$30,158.00 by March 20, 2015.

12. By a letter dated March 10, 2015, petitioner’s counsel sought clarification from COMIDA concerning COMIDA’s February 20, 2015 demand letter. COMIDA did not respond to petitioner’s counsel’s letter.

13. On May 18, 2015, COMIDA sent a notice to the Division that petitioner had failed to pay the sum demanded in the demand letter. This notice cites the Division’s February 12, 2014 Technical Memorandum (TSB-M-14 [1.1] S), as justification in support of COMIDA’s demand for payment from petitioner.

14. By a letter dated May 21, 2015, the Division advised petitioner that sales tax exemptions claimed with respect to certain purchases made in connection with the hotel project exceeded, by \$30,158.00, the \$223,200.00 sales tax exemption benefit amount authorized with respect to the hotel project. The Division requested payment of such amount, plus interest, within 30 days.

15. The Division issued to petitioner a notice and demand (L-043891503), dated November 6, 2015, determining and assessing tax due in the amount of \$30,158.00 plus interest.

16. On or about October 13, 2015, petitioner paid the sum of \$33,126.87, representing the foregoing amount of tax, plus interest, to the Division.

17. Petitioner filed an application for credit or refund of sales or use tax, dated October 14, 2015, seeking a refund of the foregoing amount paid for the period August 21, 2012 through June 30, 2014.

18. By a refund claim determination notice dated February 18, 2016, petitioner's refund application was denied.

19. Enclosed along with each of the sales tax appointment letters referenced above, COMIDA also provided petitioner with a contract in lieu of exemption certificate. As explained in the appointment letters, the contract in lieu of exemption certificate was to serve as documentation for not charging petitioner sales tax when making purchases in connection with the hotel project. Like the sales tax appointment letters, each of the contracts in lieu of exemption certificate was identical except for the date of expiration of petitioner's agency appointment. With respect to extensions of the agency appointment, the contracts in lieu of exemption certificate provide that COMIDA may consent to a written request for such an extension, at COMIDA's discretion, and that COMIDA may not unreasonably withhold such consent.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed General Municipal Law § 875 (3) (b), which authorizes an industrial development agency to recover from an appointed agent sales and use tax exemption benefits in excess of the amount authorized. The Administrative Law Judge noted that this provision also applies to any amendment or revision to a project, made on or after March 28, 2013, that involves additional funds or benefits.

The Administrative Law Judge determined that the agency authority expiration date extensions were amendments or revisions to the hotel project. The Administrative Law Judge

reasoned that, as a result of these extensions, petitioner remained authorized to gain the full amount of its sales tax exemption benefits. The Administrative Law Judge thus concluded that the expiration date extension dated February 24, 2014 was an amendment to the hotel project involving additional benefits, made after March 28, 2013, and, hence, General Municipal Law § 875 (3) (b) was applicable.

Based upon a review of the expiration date extension letters and forms ST-60, the Administrative Law Judge found that COMIDA capped petitioner's sales tax exemption benefit for the hotel project at \$223,200.00. Petitioner's claim of \$253,359.96 in sales tax exemption benefits thus exceeded the cap by \$30,158.00. The Administrative Law Judge determined that this excess was properly subject to repayment pursuant to General Municipal Law § 875 (3) (b) and that, accordingly, petitioner's refund claim was properly denied.

ARGUMENTS ON EXCEPTION

As it did below, petitioner contends that General Municipal Law § 875 (3) (b) does not apply in the present circumstances because there was no amendment or revision to the hotel project and no grant of additional funds or benefits. Petitioner contends that the extensions of petitioner's appointment as COMIDA's agent did not supplement the sales tax exemption benefits that had already been approved; rather, such extensions allowed petitioner to take full advantage of the approved benefits. Petitioner asserts that a failure by COMIDA to extend the appointment would have resulted in a curtailment of the previously conferred benefits. Petitioner further contends that COMIDA's approval resolutions do not contain any expiration date for petitioner's appointment and that the contracts in lieu of exemption certificate, which do reference an expiration date, expressly contemplate that the appointment could be extended and that COMIDA would not unreasonably withhold its consent to such an extension. Petitioner

asserts that COMIDA was thus contractually obligated to extend the period of petitioner's appointment and that COMIDA's compliance with this requirement cannot reasonably be interpreted as the granting of an additional benefit upon petitioner.

Petitioner also contends that, even if General Municipal Law § 875 (3) (b) does apply, the assessment was improper because the amount of sales tax exemption benefits authorized by COMIDA with respect to the hotel project was not limited to \$223,200.00. Petitioner contends that, contrary to the Administrative Law Judge's conclusion, the forms ST-60 listed only estimates of sales and use tax exemption benefits and of the value of exempt goods and services. Petitioner contends that such estimates may not be construed as limits on total project costs and corresponding sales tax exemption benefits. Petitioner further contends that any limitation on the amount of the exemption would have been inconsistent with COMIDA's approval resolutions, which broadly authorize petitioner to make all purchases in connection with the construction of the project and make no reference to a cap on such purchases.

The Division agrees with the Administrative Law Judge's conclusion that the appointment letters and the ST-60 forms establish that petitioner's sales tax exemption benefits were limited to \$223,200.00 and that petitioner's reported sales tax exemption benefit exceeded the authorized amount.

The Division also agrees with the Administrative Law Judge's conclusion that the excess sales tax exemption benefits petitioner received are subject to recapture pursuant to Tax Law § 875 (3) (b). The Division contends that the February 24, 2014 expiration date extension letter, issued after the effective date of the recapture provision, was an additional benefit to petitioner because, as the Administrative Law Judge found, it enabled petitioner to gain the full amount of the sales tax exemption benefits extended by COMIDA.

OPINION

An IDA is a public benefit corporation engaged in the promotion of economic development in its local community (*see* General Municipal Law § 858). To achieve that purpose, an IDA is authorized to undertake projects and to appoint agents or project operators to develop those projects (*see* General Municipal Law § 854 [4]). COMIDA appointed petitioner as its agent to complete the hotel project pursuant to this authority. An IDA provides financial assistance to such an agent, including sales tax exemptions, in furtherance of the completion of projects (*see* General Municipal Law § 854 [14]). COMIDA granted such a sales tax exemption to petitioner.

The authority for an IDA's sales tax exemption is General Municipal Law § 874 (1), which declares that an IDA performs a "governmental function" and "shall be required to pay no taxes . . . upon any of the property acquired by it." Such authority is also found in the sales tax exemption for the State of New York, an exemption that includes public corporations (Tax Law § 1116 [a] [1]; *see also* 20 NYCRR 529.2 [a] [2] [IDAs cited as an example of a public corporation]). An IDA's exemption from sales tax extends to private developers acting as the IDA's agent for project purposes (*Matter of Fagliarone, Grimaldi & Assoc. v Tax Appeals Tribunal*, 167 AD2d 767, 768 [3rd Dept 1990] citing *Wegmans Food Mkts. v Department of Taxation and Fin.*, 126 Misc 2d 144, 150 [Sup Ct Monroe County 1984] *affd on opn. below* 115 AD2d 962 [4th Dept 1985], *lv denied* 67 NY2d 606 [1986]).

General Municipal Law § 875 (3) (b) directs an IDA to recover from an agent sales tax exemption benefits taken that are in excess of the amount authorized. That provision also states that an agent's failure to pay over such excess amounts upon demand by the IDA provides grounds for an assessment by the Division. In the present matter, following COMIDA's

unsuccessful demand for payment, the Division made such an assessment by issuance of the notice and demand dated November 6, 2015. As noted, the amount of the assessment is the excess of the total sales tax exemption benefit as reported by petitioner on its 2013 and 2014 ST-340s (filed pursuant to General Municipal Law § 874 [8]), over the estimated value of petitioner's sales tax exemption as reported on COMIDA's ST-60s (filed pursuant to General Municipal Law § 874 [9]).

We find, first, that the Administrative Law Judge properly determined that petitioner received sales tax exemption benefits in excess of the amount authorized under General Municipal Law § 875 (3) (b). Each of the three sales tax appointment letters issued to petitioner and dated August 21, 2012, December 1, 2012, and February 24, 2014, respectively, state that the “[t]otal costs of the project *cannot exceed* the project costs as detailed on the enclosed ST-60 form (emphasis added)” (*see* findings of fact 4 and 5). Each of the three corresponding forms ST-60 indicate an estimated sales tax exemption benefit of \$223,200.00 (*see* findings of fact 8 and 9). We agree with the Administrative Law Judge that the express and unequivocal language of the sales tax appointment letters and the reference in each to the ST-60s “clearly, consistently and effectively” notified petitioner that the maximum sales tax exemption benefit available to it was \$223,200.00. Like the Administrative Law Judge, we see nothing inconsistent and, indeed, think it reasonable to use the estimated sales tax exemption benefit as the maximum allowable benefit. As the Administrative Law Judge noted, if the estimates proved to be too low, petitioner could have sought to amend the project.

Petitioner asserts that this interpretation of the sales tax appointment letters and ST-60s is inconsistent with the language of COMIDA's resolution appointing petitioner as COMIDA's agent. That resolution authorized petitioner to make “all purchases” of “every kind” in

connection with constructing and equipping the hotel project. Petitioner contends that the broad language of the resolution should control. The resolution, however, contains no information regarding the cost of the project or the benefits to petitioner. Such information is found elsewhere among the documents related to the hotel project, including the sales tax appointment letters and the ST-60s, all of which, as noted, refer to \$223,200.00 as petitioner's sales tax exemption benefit. As the Administrative Law Judge observed, petitioner's interpretation would render such language meaningless. We note also that petitioner's interpretation could make it difficult for COMIDA to control the cost of a project. We thus reject petitioner's contention that COMIDA did not set a specific limit on the amount of petitioner's sales tax exemption benefits.

Petitioner also complains of errors and inconsistencies in the sales tax appointment letter and the ST-60s. Petitioner notes that the August 21, 2012 and December 1, 2012 ST-60 forms do not report the project costs as the accompanying appointment letters indicate. Such forms do, however, report the "approximate savings of \$223,200.00" which plainly refers to the estimate of the sales tax benefit. This error is thus inconsequential. Petitioner also asserts that the appointment letters indicate that the ST-60s would provide a detailed statement of the hotel project's costs and that those forms do not provide such a detailed statement. This is a misinterpretation of the appointment letters. As noted previously, the relevant language in the appointment letters is "[t]otal costs of the Project cannot exceed the project costs *as detailed* on the enclosed ST-60 form (emphasis added)." In our view, such language requires only a listing of such costs and not a detailed statement as petitioner asserts.

We next address whether General Municipal Law § 875 (3) (b) applies in the present circumstance, thereby authorizing the Division's issuance of the November 6, 2015 notice and demand.

General Municipal Law § 875 took effect on March 28, 2013. As relevant here, it applies to “any amendment or revision involving additional funds or benefits made on or after [March 28, 2013] to any project established, agent or project operator appointed, financial assistance provided, or payment in lieu of taxes entered into, prior to that date” (L 2013, c 59, pt J, § 12). Of the documents discussed herein, only those pertaining to the extension of petitioner’s agency authority through June 30, 2014 were created after March 28, 2013. As noted, the Administrative Law Judge determined that this last extension of petitioner’s agency appointment triggered the application of General Municipal Law § 875 (3) (b).

We agree with the Administrative Law Judge that the extension of petitioner’s agency appointment through June 30, 2014 was “an amendment or revision involving additional funds or benefits” to the hotel project, as it provided petitioner with an additional four months to complete it. The benefit to petitioner was the opportunity to continue to purchase project property, free of sales tax, as opposed to no longer possessing authority to make such exempt purchases. As noted by the Administrative Law Judge, petitioner thus gained the additional monetary benefit resulting from the extension that would otherwise have been curtailed by expiration.

Petitioner does not dispute that the February 24, 2014 extension allowed it to take full advantage of the approved sales tax benefit, but contends that such advantage should not be construed as an additional benefit for purposes of determining whether General Municipal Law § 875 (3) (b) applies here. We disagree. In our view, the granting of additional time to allow petitioner to maximize its monetary gain is properly construed as an additional benefit for purposes of L 2013, c 59, pt J, § 12.

We also disagree with petitioner’s contention that there was no amendment or revision to the projects because COMIDA was contractually obligated to grant the extensions. To the

contrary, the contracts in lieu of exemption certificate expressly vest COMIDA with discretion, “not to be unreasonably withheld,” to extend petitioner’s appointment. Similarly, the sales tax appointment letters state that the appointment may be extended by “showing good cause.” COMIDA was thus not obligated to grant extensions, but only to act reasonably with respect to extension requests. On this point, petitioner also notes that COMIDA’s resolution appointing petitioner as COMIDA’s agent does not contain any expiration date for petitioner’s appointment. The sales tax appointment letters, ST-60 forms and contracts in lieu of exemption certificates do contain expiration dates for petitioner’s agency status, however, and these documents make clear COMIDA’s intent that petitioner’s agency status would expire on a date certain, unless extended.

In summary, we find that petitioner received \$30,158.00 in sales tax exemption benefits in excess of the amount authorized by COMIDA; that General Municipal Law § 875 (3) (b) applies under the present circumstances; and that, accordingly, petitioner’s excess benefits were properly subject to recapture pursuant to that provision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jefferson Hotel Associates LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jefferson Hotel Associates LLC is denied; and
4. The Division of Taxation’s refund claim determination notice, dated February 18, 2016, is sustained.

DATED: Albany, New York
June 27, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner