

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEFFERSON HOTEL ASSOCIATES LLC : DETERMINATION
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 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 August 21, 2012 through June 30, 2014.

On September 20, 2017 and September 28, 2017, respectively, petitioner, appearing by The Halpin Firm (Robert L. Halpin, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), waived a hearing pursuant to 20 NYCRR 3000.12 and submitted this matter for determination based on documents and briefs to be submitted by February 19, 2018, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner has established that its purchases, made in connection with the construction of a hotel facility and as an agent of an industrial development agency, that were in excess of the total purchase amounts that had been estimated as qualifying for exemption from sales and use taxes, were in fact properly exempt from such taxes.

II. Whether petitioner has established that General Municipal Law § 875 (3) does not apply to its authority as an agent of an industrial development agency with regard to the foregoing allegedly excess exempt purchases, and therefore cannot serve as the basis for requiring the payment of sales and use taxes on such purchases made by petitioner under claim of such authority as an agent.

FINDINGS OF FACT

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

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.

petitioner 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.

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 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

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

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).

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.

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,” 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

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.

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.

CONCLUSIONS OF LAW

A. An Industrial Development Agency (IDA), such as COMIDA, is a public benefit corporation established under General Municipal Law (GML) Article 18-A. As such, its purchases made within the authority of the GML are exempt from sales and use taxes (GML § 874; Tax Law § 1116 [a] [1]). To utilize this exemption as a development tool, IDAs are authorized to undertake projects, per GML § 854, and in connection therewith, to appoint a project developer as an agent for purposes of developing a project (GML § 854 [4]). The developer, as agent, and the developer's contractors and subcontractors, are entitled to the exemption from sales tax on purchases of "project property" (GML §§ 854 [4], 8741[1]). There is no question that petitioner was appointed as COMIDA's agent with respect to the Hotel Project herein. Rather, the question is whether COMIDA, and in turn, the Division, is entitled to recover sales and use taxes with respect to project property purchased by petitioner, without the payment of such taxes, to the extent the amount of such purchases, and the resulting sales and use tax exemption benefit thereon, exceeded the authorized amount of such purchases and resulting exemption benefit.

B. Within 30 days of the designation of petitioner as its agent with regard to the Project, COMIDA was required, per GML § 874 (9), to file a statement with the Division reporting such designation. Section 874 (9) required COMIDA to give:

“ a brief description of the property and/or services intended to be exempted from [sales and use] taxes as a result of such appointment as an agent, indicating the agency's rough estimate of the value of the property and/or services to which such appointment as agent relates, indicating the date when such designation as agent became effective and indicating the date upon which such designation as agent shall cease.”

The forms ST-60 filed by COMIDA with the Division were consistent with this required reporting mandate of GML § 874 (9).

C. GML § 874 (8) requires IDA designated agents, such as petitioner, to file an annual statement with the Division, setting forth thereon “the value of all sales and use tax exemptions claimed by such agents” The forms ST-340 filed by petitioner for 2013 and 2014 were consistent with this required reporting mandate of GML § 874 (8).

D. GML Article 18-A was amended in 2013 by the addition of section 875 (L. 2013, c. 59, pt. J, § 2, eff. March 28, 2013). Among other things, section 875 imposed new requirements related to the recovery or recapture of certain sales and use tax exemption benefits. GML § 875 (3) (b), as added, provides, in relevant part, as follows:

“[t]he IDA shall recover, recapture, receive, or otherwise obtain from an agent, project operator or other person or entity state sales and use exemption benefits taken or purported to be taken by any such person to which the person is not entitled or *which are in excess of the amounts authorized* or which are for property or services not authorized or taken in cases where such agent or project operator, or other person or entity failed to comply with a material term or condition to use property or services in the manner required by the person’s agreement with the IDA. * * * The failure to pay over such amounts to the IDA shall be grounds for the commissioner [of taxation] to assess and determine state sales and use taxes due from the person under article twenty-eight of the tax law, together with any relevant penalties and interest due on such amounts.” (italics added)⁶

E. As noted, GML § 875 took effect as of the March 28, 2013 date of its adoption, and was made applicable to:

“(a) any project established, agent or project operator appointed on or after [March 28, 2013] and any financial assistance or agreement regarding

⁶ GML § 875 (6) provides as follows:

“[t]he commissioner [of taxation] is hereby authorized to audit the records, actions, and proceedings of an IDA and of its agents and project operators to ensure that the IDA and its agents and project operators comply with all the requirements of this section. Any information the commissioner [of taxation] finds in the course of such audit may be used by the commissioner [of taxation] to assess and determine state and local taxes of the IDA’s agent or project operator.”

payments in lieu of taxes provided thereto, [and] (b) 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)

F. Petitioner points out that the Hotel Project was established, and petitioner was appointed as COMIDA’s agent, on August 21, 2012, a date that is prior to the March 28, 2013 effective date of the provisions of GML § 875 (3) (b). Petitioner argues, in turn, that there were no amendments or revisions involving additional funds or benefits after such effective date, and that the provisions of GML § 875 (3) (b) simply do not apply and do not allow for the recovery of any alleged excess benefits under the circumstances presented herein. Petitioner specifically maintains that GML § 875 (3) (b) cannot serve as a basis for requiring a payback of the \$30,158.00 difference between the “estimated” or “anticipated” sales tax exemption benefit amount set forth in the forms ST-60 filed in connection with the Hotel Project (\$223,200.00), and the final total value of the sales tax exemption benefits realized by petitioner, as reported on forms ST-340 (\$253,359.96). Petitioner posits that nothing in the documentation indicates the \$223,200.00 amount was to serve as a “hard limit” on the authorized amount of the sales tax exemption benefit to which it was entitled, but rather that such amount was simply an estimate of the value of the benefit based only on a rough estimate of the Hotel Project’s costs.

G. The August 21, 2012 commencement date of petitioner’s appointment as COMIDA’s agent for the Hotel Project, and the June 30, 2014 final expiration date of that appointed status, as extended, straddle the March 28, 2013 effective date of GML § 875. Consequently, in order for the recovery provision of GML § 875 (3) (b) to apply in this case, it must be found that, on or subsequent to March 28, 2013, there was a Hotel Project amendment or revision involving

additional funds or benefits with respect to the Hotel Project, agent or project manager appointed, or financial assistance provided prior to such March 28, 2013 date (*see* Conclusion of Law E).

H. As an initial matter, the two agency authority expiration date extensions granted by COMIDA to petitioner clearly were amendments or revisions to the Hotel Project. That is, the benefit of purchasing project property, tax free, as the appointed agent of COMIDA, versus the end of such authority to do so, was provided by the amendments revising and extending the original expiration date of such agency authority. As a consequence of the extensions, petitioner remained authorized to gain the full amount of its originally estimated sales tax exemption benefit. In addition, however, petitioner continued to use its agent status to make additional tax free purchases of project property in excess of the amount of such estimated benefit. The second (February 24, 2014) amendment in this case occurred after the March 28, 2013 effective date of GML § 875 (3) (b), and resulted in petitioner gaining not only the full \$223,200.00 amount of benefit that was originally estimated, approved and granted, but also gaining an additional \$30,158.00 benefit over and above such originally estimated benefit amount (*see* Finding of Fact 10, n 5).

I. As of the August 21, 2012 date on which the Hotel Project was approved, and petitioner was designated as COMIDA's agent, the sales tax exemption benefit granted to petitioner was set as an "estimated" value of \$223,200.00. This description of the benefit as "estimated" is fully consistent with the language of GML § 874 (9), which calls for a "rough estimate of the value of the property or services" from which the value of the benefit will be calculated (*see* Conclusion of Law B). It is true that extensions such as those granted in this case could be obtained "upon good cause shown" (*see* Finding of Fact 4), and were "not to be unreasonably withheld" (*see* Exhibit G, p. 6). It seems patently obvious that such extensions would not only likely be

requested, per the consistent language in the sales tax appointment letters (*see* Findings of Fact 4 and 5), but were in fact anticipated, given that the initial agency status appointment expiration date (November 30, 2012) was only approximately three months after the initial agency status grant date (August 21, 2012). This window was clearly an unreasonably short period of time within which to commence and complete the construction of the subject Hotel Project.

Notwithstanding this practical reality, it remains that as a consequence of the extensions that were granted, petitioner received the benefit of continued sales tax exemption on purchases made after the initially specified appointment expiration date, and through each of the two subsequently extended dates. Thus, by virtue of the appointment expiration extensions, petitioner gained the additional dollar benefit resulting therefrom that would otherwise have been curtailed by expiration. As such, the two extensions of the expiration dates of petitioner's status as COMIDA's agent were amendments revising the Hotel Project, specifically with respect to the period of petitioner's previous appointment as COMIDA's agent. Accordingly, the issue devolves to whether the latter of such amendments, which occurred after the March 28, 2013 effective date of GML § 875 (3) (b), involved "additional funds or benefits . . . to any project established, agent or project operator appointed, or financial assistance provided" prior to such date.

J. Petitioner argues that the sales tax exemption benefit was at all times only an estimated amount, and that there was no hard limit or cap imposed thereon (*see* Conclusion of Law F). Petitioner thus maintains it received no "additional funds or benefits" as a consequence of either of the amendments revising the expiration dates of its status as COMIDA's agent, including specifically the second amendment that occurred after the effective date of GML § 875 (3) (b). Petitioner's argument overlooks the consistent language in each of the sales tax exemption letters

issued by COMIDA, that directly refers to and explicitly limits the total amount of the benefit to the estimated amount set forth on the forms ST-60, to wit, “[t]otal costs of the Project *cannot exceed* the project costs as detailed on the enclosed ST-60 form” (*see* Finding of Fact 4, italics added). Notwithstanding that the forms ST-60 set forth COMIDA’s “estimate” of the total sales tax exemption benefit amount (*see* GML § 874 [9]), the dollar amount of such benefit was, in fact, at all times, subject to the explicit and specific total costs limitation language set forth in each of the sales tax appointment letters issued to petitioner by COMIDA.

K. The second Hotel Project amendment, dated February 24, 2014, revised and extended the expiration date of petitioner’s status as COMIDA’s agent. This amendment was made after the effective date of GML § 875 (3) (b). The February 24, 2014 sales tax exemption letter setting forth the foregoing Hotel Project amendment directly references the form ST-60, also dated February 24, 2014, which, in turn, specifically identifies the project’s costs as an estimated or anticipated amount of \$2,790,000.00, resulting in an estimated sales tax exemption benefit of \$223,200.00 (*see* Finding of Fact 8, n 3; Finding of Fact 9, n 4). Taken together, these two documents clearly cap the maximum amount of the sales tax exemption benefit at \$223,200.00. Petitioner, in fact, received the benefit amount to which it had always been entitled (\$223,200.00), based on project costs estimated (or anticipated) to be \$2,790,000.00. In addition, however, the full amount of the sales tax exemption benefit actually received by petitioner exceeded the foregoing estimated amount by some \$30,158.00, because the costs incurred by petitioner, upon which the amount of benefit taken was based (\$3,166,977.00), exceeded the costs estimate of (\$2,790,000.00) by some \$376,977.00 (*see* Finding of Fact 10, n 5). Hence, the \$30,158.00 excess amount of exemption benefit is properly subject to repayment, pursuant to the terms of GML § 875 (3) (b), as resulting from an “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.”⁷

L. There is nothing inconsistent with an estimate of the amount of a given benefit, and language that, at the same time, limits the highest amount of such benefit to an amount that cannot exceed such estimate. While an estimate is appropriate, especially at the outset of a project, when the exact total amount of project costs is not known, it is also appropriate and reasonable to limit the highest amount of available benefit to such estimated amount, as was clearly done here via the consistent language in each of the three sales tax exemption letters. The language included in the sales tax appointment letters effectively capped the maximum available sales tax exemption benefit at the sales tax exemption value of the dollar amount of project costs, as set forth by reference to the forms ST-60. Petitioner’s argument that the sales tax exemption benefit was not capped at the amount of the estimate is simply untenable in light of such language, as it renders the same meaningless. Carried to its logical end, petitioner’s argument would leave the amount of available benefit, essentially, unlimited. Moreover, there is nothing that precluded petitioner from having sought a greater estimated benefit from COMIDA, by seeking an amendment to the Hotel Project directly increasing the estimated sales tax benefit amount when, if, and as it became evident that the estimated costs amount would be less than the actual amount of costs to be incurred. Such an amendment, however, if made after the effective

⁷ The amount of sales tax exemption benefit reported on form ST-340 for 2013 (\$188,542.00) was \$34,658.00 less than the estimated \$223,200.00 total sales tax exemption benefit available for the Hotel Project. The excess benefit resulting from the extension granted on March 1, 2014 (i.e., after the effective date of GML § 875 [3]) therefore was the \$30,158.00 difference between the remaining \$34,658.00 amount of capped benefit available (\$223,200.00 less \$188,542.00 equals \$34,658.00), and the \$ 64,817.76 amount of benefit claimed for 2014.

date of GML § 875 would, of course, have been plainly subject to the recovery or recapture provision of GML § 875 (3) (b).

M. In sum, the language of the COMIDA sales tax appointment letters, and the reference in each to form ST-60, clearly, consistently and effectively notified petitioner that the maximum sales tax exemption benefit amount was capped at \$223,200.00. Consequently, any purchases made by petitioner in excess of such amount were in excess of COMIDA's specific grant of authority to petitioner, as its agent, on such sales tax appointment letters. By virtue of the second amendment to the Hotel Project, made after March 28, 2013, petitioner received the benefit of an extension of its status as COMIDA's agent, carrying with it the continued benefit of making tax free purchases in connection with the Hotel Project. Petitioner's purchases under such status, however, exceeded the maximum amount of such benefit, as shown by the forms ST-340 it filed. Hence, the amount of exemption benefit petitioner gained in excess of such maximum authorized benefit amount was garnered as a direct result of the second amendment, revising and extending COMIDA's grant of authority to petitioner as its agent. This excess amount is properly subject to repayment, pursuant to the terms of GML § 875 (3) (b), as the result of "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."

N. The petition of Jefferson Hotel Associates LLC is hereby denied, and the Division's Refund Claim Determination Notice dated February 19, 2016, is sustained.

DATED: Albany, New York
August 16, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE