

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S160518A

The Department of Taxation and Finance (“the Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether sales and use tax exemption benefits apply to materials purchased by an agent or subagent of the local Industrial Development Agency (IDA) for off-site improvements that will subsequently be owned by the local utility (“Utility”). Petitioner also asks if the conclusion is different if the improvements are required to be funded by the Petitioner under the utility rate tariff established with the Public Service Commission.

Facts

Petitioner and the IDA have entered into an agent agreement, a related lease/leaseback with respect to a project (“the Project”) to be located in New York. Petitioner, in accordance with the agent agreement, desires to appoint the Utility as a subagent and the Utility will designate a subcontractor as subagent to purchase materials and perform electrical infrastructure improvements supporting the Project (“the Improvements”). Petitioner is required to pay for the Improvements pursuant to the relevant utility tariff. The Improvements are located off the site of the Project and the work will be performed by sub-contractors/subagents at that off-site location, but wholly within the municipality for which the IDA was organized. The Improvements will be owned by the Utility upon installation.

Analysis

IDAs are empowered “[t]o acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects.” General Municipal Law (“GML”) § 858(10). An IDA is “regarded as performing a governmental function in the exercise of the powers conferred upon it . . . and 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.” GML § 874(1).

“While the statute explicitly confers this exemption only on the industrial development agency, private developers who act as the agency’s agent for project purposes may also enjoy this tax benefit.” *Fagliarone, Grimaldi & Assoc. v. Tax Appeals Trib.*, 167 AD2d 767 (3d Dep’t 1990) *citing Wegmans Food Mkts. v. Department of Taxation & Fin. of State of N.Y.*, 126 Misc2d 144, 150 (Sup Ct Monroe County, Nov. 2, 1984) *aff’d* 115 AD2d 962 (4th Dep’t 1985) *lv to app denied* 67 NY2d 606 (1986); *Elmer W. Davis, Inc.*, 104 AD3d 50, 52 (3d Dep’t 2012). However, “the fact is that General Municipal Law § 874(1)

specifically exempts only the industrial development agency itself from paying taxes upon its ‘property’ or its ‘activities.’” *Id.* at 769. Accordingly, the property purchased by an agent of the IDA will be exempt from tax as long as the IDA owned, controlled or supervised it in connection with the IDA’s activities, including the equipping and furnishing of a project. *See Fagliarone, Grimaldi & Assoc. v. Tax Appeals Trib.*, 167 AD2d at 768-769.

Here, the Improvements will be purchased by or for the Utility, not the IDA. The IDA will not own, control or supervise the installation or use of the Improvements. Accordingly, the Improvements purchased for the Utility are not exempt from sales tax as purchases by an agent of the IDA. *See Fagliarone, Grimaldi & Assoc. v. Tax Appeals Trib.*, 167 AD2d at 768-769. Whether or not the Utility is requiring the Petitioner to pay for the Improvements pursuant to a utility tariff is irrelevant to this conclusion.

Similarly, while a project may include movable equipment, it does not have a transitory location. *See Elmer W. Davis, Inc.*, 104 AD3d at 55. General Municipal Law § 854(4) “references the ‘location’ of the designated facility, which is fixed, and that is ‘the project location for tax purposes’” *Id.* Here, the materials purchased by Petitioner for the Improvements will not be located at the project location. Therefore, the purchases are not entitled to a tax exemption as a purchase by an agent of the IDA.

DATED: December 13, 2016

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.