

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
STAT EQUIPMENT CORP. :
for Redetermination of a Deficiency or for Refund of :
Corporation Tax under Article 9 of the Tax Law for the :
Years 1985 through 1988. :

DECISION
DTA NOS. 812095
AND 812096

In the Matter of the Petition :
of :
BI-COUNTY AMBULANCE AND AMBULETTE :
TRANSPORT CORP. :
for Redetermination of a Deficiency or for Refund of :
Corporation Tax under Article 9 of the Tax Law for the :
Years 1985 through 1987. :

Petitioners Stat Equipment Corp. and Bi-County Ambulance and Ambulette Transport Corp., 664 Bluepoint Road, Holtsville, New York 11742, filed an exception to the determination of the Administrative Law Judge issued on February 2, 1995. Petitioners appeared by Hodgson, Russ, Andrews, Woods & Goodyear, LLP (Christopher L. Doyle, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners also filed a reply brief. Oral argument was heard on August 8, 1995, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUE

Whether petitioners are principally engaged in the conduct of transportation businesses and therefore subject to tax under Article 9 of the Tax Law or business corporations and therefore subject to taxation under Article 9-A of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "29" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Prior to the hearing, the parties, by their respective representatives, entered into stipulations of fact with regard to both matters. The contents of those stipulations are set forth in Findings of Fact "1" through "22" below.

1. With regard to the matter of the petition of Bi-County Ambulance and Ambulette Transport Corp. ("Bi-County"), DTA No. 812096, on or about July 10, 1991, the Division of Taxation ("Division") issued to Bi-County a series of notices of deficiency, numbers C910710973N, C910710974M, C910710975N, C910710976N, C910710977M and C910710978M, for a total amount of tax due in the sum of \$12,742.00, interest of \$4,010.46 and penalties of \$2,361.01.

2. The notices referred to in Finding of Fact "1" covered the taxable years ended December 31, 1985 through December 31, 1987 (referred to hereinafter as the "audit period").

3. On December 9, 1992, a conciliation conference was conducted with regard to Bi-County by the Bureau of Conciliation and Mediation Services.

4. By Conciliation Order dated April 16, 1993, the tax liability was sustained in full, while penalties were abated. Thus, the assessment asserted by the notices issued to Bi-County was reduced to \$12,742.00 in tax, plus interest.

5. Bi-County accepts the findings of the conciliation conferee to the extent that penalties were abated.

6. During the audit period, Bi-County was principally engaged in the business of providing ambulance services.

7. During the audit period, more than 50% of Bi-County's gross receipts were derived from ambulance services.

8. For all years during the audit period, Bi-County filed a timely franchise tax return under Article 9-A of the Tax Law.

9. The Division determined that Bi-County was engaged in the operation of ambulance services and that these services were transportation services within the meaning and intent of Article 9 of the Tax Law. This determination was the basis for the issuance of the notices in this matter. Bi-County contends that, while it does render ambulance services, they do not constitute transportation services.

10. The deficiencies at issue in the Bi-County matter were the result of a recomputation of Bi-County's franchise tax liability under Article 9.

11. During the audit period, Bi-County's business activities were similar to those engaged in by the other petitioner herein, Stat Equipment Corp., a related corporation which was also subject to a corporation franchise tax audit by the Division.

12. With regard to the matter of the petition of Stat Equipment Corp. ("Stat"), DTA No. 812095, the parties stipulated that on or about July 10, 1991, the Division issued to Stat a series of notices of deficiency referenced as numbers C910710962N, C910710963M, C910710964N, C910710965N, C910710966M, C910710967N, C910710968N, C910710969N, C910710970M and C910710971M, for a total tax deficiency of \$15,341.00, interest of \$4,182.35 and penalties of \$2,579.05.

13. The notices referred to in Finding of Fact "12" cover the taxable years ended December 31, 1985 through December 31, 1988.

14. On December 9, 1992, a conciliation conference was conducted with regard to the matter of Stat before the Bureau of Conciliation and Mediation Services.

15. By Conciliation Order dated April 16, 1993, the principal tax liability was sustained, but penalties were abated. Thus, the assessment asserted by the notices issued to Stat was reduced to \$15,341.00, plus interest.

16. Stat accepted the findings of the conciliation conferee to the extent that penalties were abated.

17. During the audit period, Stat was principally engaged in the provision of ambulance services.

18. More than 50% of Stat's gross receipts were derived from ambulance services during the audit period.

19. For all years during the audit period, Stat timely filed franchise tax returns under Article 9-A of the Tax Law.

20. The Division determined that Stat was engaged in the operation of ambulance services, and that said services were transportation services within the meaning and intent of Article 9 of the Tax Law. Stat concedes that it did, in fact, render ambulance services but that said services did not constitute transportation services.

21. The deficiencies at issue herein are the result of a recomputation of Stat's franchise tax liability under Article 9.

22. Stat's business activities during the audit period were substantially similar to those engaged in by the other petitioner herein, Bi-County Ambulance and Ambulette Transport Corp., a related corporation which was also the subject of a franchise tax audit by the Division.

23. During the years 1985 through 1988, Bi-County and Stat were related companies, being subsidiaries of "Medibus". Petitioners are both licensed by the State of New York Department of Health to provide ambulance services. Altogether, petitioners maintain a fleet of

17 ambulances and two ambulettes. Petitioners transport persons from hospitals to hospitals, hospitals to health care facilities, and surgical centers to hospitals, among other destinations.

24. The two petitioners maintain one dispatch center. While Stat's ambulances are dispatched to locations in Suffolk and Nassau Counties on Long Island, Bi-County provides ambulance services in Suffolk, Nassau and Queens Counties. By regulation and contract, the ambulances and ambulettes operated by petitioners are dispatched only to locations in the counties serviced by the respective corporations which include counties in the Metropolitan Transportation District.

25. The dispatchers are paramedics, one of the highest levels of emergency medical technicians, who make the determination as to whether an ambulance or ambulette is needed in order to transport the person in need. Once an ambulance is dispatched, vehicle personnel may be in constant contact with physicians during the transportation of a patient.

26. Ambulette services constitute a very small portion of petitioners' activities and involve nonmedically necessary transportation of physically challenged individuals. Ambulettes do not contain either basic life support ("BLS") equipment or advanced life support ("ALS") equipment.

27. Petitioners provide ambulance services 24 hours a day, while ambulette services are rendered between the hours of 7:00 A.M. and 6:00 P.M.

28. Dispatchers receive calls from health care providers or actual parties in distress, at which time the appropriate transport vehicle is dispatched.

We modify finding of fact "29" of the Administrative Law Judge's determination to read as follows:

29. Petitioners' drivers, dispatchers and attendants are emergency medical technicians trained and licensed by the State of New York Department of Health.

Although the ALS ambulances dispatched by petitioners are required to have a minimum of an advanced emergency medical technician ("EMT"), pursuant to the rules and regulations of each

of the oversight groups responsible for administering ambulance services, petitioners require paramedics on each of the ambulances they dispatch. As mentioned earlier, a paramedic is an EMT with a higher level of training (2,000 hours) and experience as well as an affiliation with a university hospital or medical college. The decision on whether to dispatch an ambulance or ambulette is made by petitioners' dispatcher, a paramedic, based on the medical needs of the individual.¹

30. Pre-hospital care is occasionally provided during the transport of a patient and said care must comply with Federal, State and local health regulations concerning the administration of drugs, medical equipment standards and employee training.

Ancillary to the provision of pre-hospital care are pre-hospital care reports required by the Department of Health, which are primarily devoted to the explanation of the medical treatment of the patient by petitioners.

Petitioners have a physician on their staff to establish protocols (with the regional medical advisory committees), assist with the continuing medical education requirements for the staff, and assist with quality and assurance and quality improvement. Petitioners are also required to maintain "medical control" agreements with certain local hospitals. As required by the patient's condition, petitioners' EMT contacts medical control by cellular telephone, where a responding physician may order treatment based on the description given by the EMT over the phone, telemetric information transmitted by the ambulance EKG monitor to the hospital electronically, or both. The protocols establish the standard operating procedures utilized by ambulance services in dealing with medical treatment of patients.

31. Petitioners had a policy and procedure manual in effect during the years in issue, of which less than two pages were devoted to the operation of the ambulance vehicle itself and the maintenance of the vehicle. The manual deals primarily with medical protocols, Department of

¹We modified finding of fact "29" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

Health regulations which pertain to ambulance services, and general rules and procedures with respect to the treatment of patients and the like.

32. Neither the Department of Transportation nor the Department of Motor Vehicles has prescribed special licensure or registration requirements for ambulances or ambulance drivers. However, the Department of Health requires that every ambulance have at least one EMT on board, which standard is exceeded by petitioners, in that they require that ambulance drivers and non-driver technicians be EMTs, thus providing at least two EMTs on board at all times.

33. Periodic inspections are performed by respective regulatory authorities to ensure that the transport vehicles maintain the proper standards and that the staff maintains the proper level of training.

34. Advanced life support equipment such as cardiac monitors, hands-off defibrillators, portable infusion control devices, portable ventilation, pulse oscillators, balloon pumps and medications, including narcotics, are maintained by petitioners for use when transporting patients.

Basic life support equipment such as oxygen, stretchers, splints, suction units, obstetric kits and burn kits is required by the rules and regulations of the various oversight groups responsible for administering ambulance services.

In contrast, the ambulettes do not contain basic or advanced life support equipment and are licensed only by the Department of Transportation and not the Department of Health.

35. Petitioners estimated that 99% of their transportation activity involves the use of ambulances to transport patients.

36. It was estimated that 70% of petitioners' annual services were the result of emergency calls.

37. While petitioners provide medical services to patients, usually patients do not pay directly for these services. Most payments are received through third parties, including Medicare/Medicaid, health maintenance organizations and major medical insurance companies

like Metropolitan Life, Empire Blue Cross or Aetna. A typical invoice submitted into evidence showed a breakdown of three separate charges for paramedic ambulance, mileage and medical equipment. Typically, health insurance carriers reimbursed only for the payment of "medical expenses".

38. During the audit period, petitioners' charges were based on their own private rate schedule or rates mandated by public insurers like Medicaid/Medicare. The rates charged by petitioners varied depending upon the type of medical equipment needed for transporting the patient and the number of miles the patient was transported. In addition, a patient would pay for medication and other necessary or extraordinary equipment. Rates were reviewed yearly. There was a differentiated scale for BLS and ALS, the former being \$125.00 and the latter \$250.00. Separate charges were also levied for cardiac monitoring, oxygen and other treatment expenses. Petitioners maintained different rates for private billing versus Medicaid and Medicare billing.

Petitioners' charges for patient care reflected the relative costs associated with the different elements of the services provided as in the case of drivers employed for ambulette services, who received only \$5.00 to \$6.00 per hour, while ambulance drivers received between \$12.00 and \$15.00 per hour. Additionally, ambulances purchased by petitioners, before being fitted with the required equipment, cost over two times more than ambulettes.

The cost of medical equipment required on BLS ambulances by the Department of Health runs between \$10,000.00 and \$20,000.00, while the cost of additional "exotic" equipment required on petitioners' ALS ambulances exceeds \$45,000.00. Therefore, the cost of the basic ambulance with no equipment at \$35,000.00, BLS equipment at \$10,000.00 to \$20,000.00 and ALS equipment could easily approach or exceed \$100,000.00.

39. Petitioners were required to carry medical malpractice insurance.

40. The 1984, 1985, 1986, 1987 and 1988 corporation franchise tax returns filed by Stat and the 1986 corporation franchise tax return filed by Bi-County stated that "transportation" was their primary business activity; however, petitioners' president and chief executive officer,

Richard Gabriele, stated that he had signed the returns without realizing that transportation was listed as petitioners' principal business activity.

OPINION

Petitioners are in the business of providing an ambulance service. The sole issue is whether petitioners are taxable on their entire net income as a general business corporation under Article 9-A of the Tax Law or on their gross receipts as "a corporation . . . principally engaged in the conduct of a transportation . . . business" under Article 9 of the Tax Law. The Administrative Law Judge concluded that petitioners were principally engaged in the conduct of a transportation business taxable under Article 9. On exception, petitioners assert that the Administrative Law Judge is wrong. Petitioners argue that the primary business function of their ambulance service is providing medical services to people who require such services while being transported to a hospital. It is the provision of these medical services which distinguishes the ambulance service from the ambulette service which petitioners concede is a transportation business. On exception, the Division argues that the Administrative Law Judge was correct that petitioners' primary business is providing transportation to their customers.

Article 9-A of the Tax Law imposes a tax on every domestic or foreign corporation for the privilege of exercising its corporate franchise (Tax Law § 209[1]). The tax is based on entire net income of the corporation or one of three other alternative basis. Specific corporations enumerated in subdivision 4 of section 209 are not subject to tax under Article 9-A. These include particular corporations liable for tax under sections 183 and 184 of Article 9 of the Tax Law.

The relevant language of section 183 of the Tax Law states, in part, that:

"[f]or the privilege of exercising its corporate franchise, or of doing business . . . every domestic corporation . . . formed for or principally engaged in the conduct of railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the City of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or

sleeping car business . . . and every other domestic corporation . . . principally engaged in the conduct of a transportation or transmission business . . . shall pay, in advance, an annual tax . . ." (Tax Law § 183, emphasis added).

Similarly, section 184 of the Tax Law states, in part, that:

"every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business . . . for the privilege of exercising its corporate franchise, or of doing business . . . shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state . . ." (Tax Law § 184, emphasis added).

Ambulance services are not one of the businesses specifically enumerated in sections 183 and 184. If petitioners are taxable under sections 183 and 184, it must be because they are "principally engaged in the conduct of a transportation . . . business."

We conclude they are not and reverse the determination of the Administrative Law Judge.

The issue is proper classification of petitioners' business activities for tax purposes. We stated the test in Matter of Capitol Cablevision Sys. (Tax Appeals Tribunal, June 9, 1988):

"[i]t is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers -- what they buy and pay for (Quotron Sys. v. Gallman, 39 NY2d 428; Matter of Holmes Elec. Protective Co. v. McGoldrick, 262 AD 514, affd 288 NY 635; Matter of McAllister Bros. v. Bates, 272 AD 511)" (Matter of Capitol Cablevision Sys., supra).

Applying the test to the facts in this case, we conclude that, while transportation, i.e., the carrying about from one place to another (Matter of Dave's Motor Transp., Tax Appeals Tribunal, March 22, 1990), is an element of the service petitioners provide to patients/customers, it is qualitatively and quantitatively ancillary to the medical services provided by petitioners. Petitioners' customers have two choices with regard to the services they purchase from petitioners, i.e., the ambulette service or the ambulance service. The ambulette service, a small portion of petitioners' business activities, involves only non-medical necessary transportation of

physically challenged people. The service is provided between the hours of 7:00 A.M. and 6:00 P.M. Ambulettes do not contain either basic life support ("BLS") equipment or advanced life support ("ALS") equipment. They are licensed only by the Department of Transportation and not the Department of Health.

In contrast, the ambulance service is staffed with emergency medical technicians as required by the Department of Health and paramedics as required by petitioners' own policy. The ambulances contain basic life support equipment (e.g., oxygen, stretchers, splints, suction units, obstetric kits) and advanced life support equipment (e.g., cardiac monitors, hands-off defibrillators, portable infusion control devices, portable ventilation, pulse oscillators). The cost of the basic ambulance is \$35,000.00. The basic life support medical equipment costs an additional \$10,000.00 to \$20,000.00, while the cost of additional "exotic" equipment required on petitioners' advanced life support ambulances exceeds \$45,000.00. In short, the cost of the equipment needed to provide medical services equals or exceeds the cost of the transportation equipment. The decision on whether to dispatch an ambulance or ambulette is made by petitioners' dispatcher, a paramedic, based on the medical needs of the individual. Pre-hospital care is occasionally provided during the transport of a patient which care must comply with Federal, State and local health regulations concerning the administration of drugs, medical equipment standards and employee training. The ambulance service is provided 24 hours a day. The Administrative Law Judge found:

"[a]ncillary to the provision of pre-hospital care are pre-hospital care reports required by the Department of Health, which are primarily devoted to the explanation of the medical treatment of the patient by petitioners.

"Petitioners have a physician on their staff to establish protocols (with the regional medical advisory committees), assist with the continuing medical education requirements for the staff, and assist with quality and assurance and quality improvement. Petitioners are also required to maintain "medical control" agreements with certain local hospitals. As required by the patient's condition, petitioners' EMT contacts medical control by cellular telephone, where a responding physician may order

treatment based on the description given by the EMT over the phone, telemetric information transmitted by the ambulance EKG monitor to the hospital electronically, or both. The protocols establish the standard operating procedures utilized by ambulance services in dealing with medical treatment of patients" (Determination, finding of fact "30").

Most payments for medical service provided by petitioners are received through third parties, including Medicare/Medicaid, health maintenance organizations and major medical insurance companies like Metropolitan Life, Empire Blue Cross or Aetna. Typically, health insurance carriers reimburse only for the payment of medical expenses. During the period petitioners estimate that 99% of their transportation activity involves the use of ambulances and that 70% of petitioners' annual services resulted from emergency calls. More than 50% of petitioners' gross receipts were derived from ambulance services during the period.

Simply stated, petitioners' customers purchase more than a "ride" from petitioners. They purchase the medical services necessary to get them to their destination in the best possible medical condition. Conversely, petitioners furnish much more than transportation to their customers.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stat Equipment Corp. and Bi-County Ambulance and Ambulette Transport Corp. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Stat Equipment Corp. and Bi-County Ambulance and Ambulette Transport Corp. is granted; and

4. The notices of deficiency dated July 10, 1991 are cancelled.

DATED: Troy, New York
January 25, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner