STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EASTERN PARAMEDICS, INC.	:	ORDER DTA NO. 822836
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 September 1, 2003 through November 30, 2005.	:	

Petitioner, Eastern Paramedics, Inc., 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 September 1, 2003 through November 30, 2005.

On September 2, 2010, the Administrative Law Judge issued a determination, which granted the petition and cancelled the Notice of Determination dated May 14, 2007.

By letter dated November 1, 2010, petitioner brought an application for costs under Tax Law § 3030.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel), filed an affirmation in opposition to the application dated December 1, 2010, which date began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, accompanying affidavits and documentation, the Division's affirmation in opposition, the determination issued September 2, 2010, and all pleadings and proceedings had herein, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioner, Eastern Paramedics, Inc. (Eastern), is a subsidiary of Rural/Metro Corporation, located in Scottsdale, Arizona. Rural/Metro generally provides Advanced Life Support (ALS) and Basic Life Support (BLS) ambulance services. Each ambulance is staffed with either two paramedics or one paramedic and an emergency medical technician and is equipped with ALS equipment (such as cardiac monitors/defibrillators, advanced airway equipment and oxygen delivery systems) as well as pharmaceuticals and medical supplies. Rural/Metro's ambulance services encompass both emergency response and nonemergency response services, including critical care and interfacility transportation.

2. Eastern is a 911 responder for emergency medical services calls with administrative offices located at 488 West Onondaga Street, Syracuse, New York. Eastern also operated bases located in Auburn, Chittenango, Brewerton, Nelliston, Herkimer and Cobleskill, New York. Its Syracuse and Auburn locations qualified for empire zone enterprise credits as of November 1, 2002.

3. All ambulance supplies are ordered from Rural/Metro's central distribution center in Omaha, Nebraska, and shipped to Eastern's 488 West Onondaga Street facility. Eastern is charged for the cost of the items shipped, and a markup is added to the cost to cover various administrative expenses. The supplies are then distributed to the outlying locations, with these bases being charged the same cost as is incurred by Eastern, with no further markups imposed. Rural/Metro's vehicles stock the necessary equipment to meet the requirements of Article 30 and Part 18 of the New York State Public Health Law, and the requirements established by the

Central New York Regional Emergency Medical Services Council (CNY REMSCO). Petitioner's ambulance supplies are used in conjunction with medical service calls.

4. On May 14, 2007, the Division of Taxation (Division) issued to Eastern a Notice of Determination of sales tax due in the amount of $26,289.73, plus interest, for the period September 1, 2003 through November 30, 2005. In the instant proceeding, the calculation of the amount of additional tax asserted as due was not in dispute and the issue presented was whether petitioner's purchases of medical supplies used on ambulances qualify for the Qualified Empire Zone Enterprise sales tax exemption pursuant to Tax Law § 1115(z).

5. The parties waived a hearing and submitted the matter for determination based upon documents and briefs. Petitioner claimed that the medical supplies were used or consumed directly or predominantly in an area designated as an empire zone. Petitioner's position was that from the moment that the ambulance supplies were delivered to the Syracuse operation center, they were in "use" as such term is contemplated by section 1115(z)(1) of the Tax Law. This "use" occurs in the empire zones because the supplies are inventoried, organized, replenished and distributed to the ambulances from a central operational hub, which is located in an empire zone. Petitioner acknowledged that the supplies may be consumed outside of the empire zones, but that the overriding "use," which begins in the operation center, directly and predominantly occurs within the empire zones. It was the position of the Division that the supplies were consumed outside the qualified empire zones at the locations where petitioner's ambulances provided medical services. The issue presented was one of first impression.

6. On September 2, 2010, the administrative law judge issued his determination that the medical supplies purchased by petitioner were, in fact, directly and predominantly used in the designated empire zones. This conclusion was based upon the meaning of the term "use," as

contained in Tax Law § 1101(b)(7), and the definitions contained in the Sales and Use Tax Regulations (20 NYCRR 526.9[b]), which define some of the terms used in Tax Law § 1101(b)(7).

7. Petitioner's November 1, 2010 application for costs seeks an award of costs in the amount of $21,300.61, consisting specifically of the following items:

a) $232.11 for disbursements.

b) $21,068.50 for legal fees billed by the law firm of Harris Beach PLLC.

8. Accompanying petitioner's application for costs were invoices submitted by Harris Beach PLLC to Rural/Metro Corporation for legal services performed with regard to the Notice of Determination issued by the Division. The invoices indicate hourly rates of $230.00 and $270.00.

9. Also accompanying petitioner's application for costs was the affidavit of the Managing Director, Corporate Tax, of Rural/Metro Corporation. The affidavit states that petitioner had fewer than 500 full-time employees at the time this proceeding was filed. In addition, the affidavit states that petitioner's net worth, at the time this proceeding was commenced, was less than $7 million. In support, petitioner submitted the balance sheets included in the separate company pro forma federal income tax returns for the tax year 2006 (reflecting June 30, 2006 and June 30, 2007 balances) and tax year 2008 (reflecting June 30, 2008 and June 30, 2009 balances).

The affidavit further states that an award of attorney's fees at a rate higher than $75.00 per hour is warranted due to the limited availability of qualified attorneys with the background and expertise to advance petitioner's arguments in this proceeding.

10. In opposition to petitioner's application, the Division maintains that petitioner has not established that Rural/Metro Corporation's net worth did not exceed the statutory limit beyond which costs may not be awarded. In support of this claim, the Division has submitted the general business corporation combined franchise tax returns of Rural/Metro Corporation (Form CT-3-A) for the fiscal years ended June 30, 2007, June 30, 2008 and June 30, 2009, that indicate that the net worth of Rural/Metro Corporation exceeded $7 million throughout the period covered by the returns. The Division notes that all invoices were submitted to Rural/Metro Corporation for payment rather than petitioner, and therefore petitioner did not incur any expenses for administrative or litigation costs. In addition, the Division contends that as the entity incurring the costs, Rural/Metro Corporation must meet the requirements of the statute in order to be awarded such costs. The Division further asserts that petitioner has failed to establish its litigation and/or administrative costs with sufficient detail to determine if the claimed expenses were reasonable, and that the costs and expenses sought to be recovered are unauthorized and unreasonable. Finally, the Division maintains that its position in proceeding with this matter, i.e., that the supplies were consumed outside the qualified empire zones at the locations where petitioner's ambulances provided medical services, was substantially justified.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

> In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
>
> (2) reasonable litigation costs incurred in connection with such court proceeding.

Reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding, but incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing. (Tax Law § 3030[c][2][B].) Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, "except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate" (Tax Law § 3030[c][1][B][iii]; ***see also*** Tax Law § 3030[c][2][B]).

B. A prevailing party is defined by the statute as follows:

> [A]ny party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):
>
> (i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and
>
> (ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is . . . any . . . corporation . . . the net worth of which did not exceed seven million dollars at the time the civil action was filed . . . .
>
> (B) Exception if the commissioner establishes that the commissioner's position was substantially justified.
>
> (i) General rule. A party shall not be treated as the prevailing party in a proceeding to which [Tax Law § 3030(a)] of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.
>
> (ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in

> subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.
>
> (iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.
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> (iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term "applicable published guidance" means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.
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> (C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court (Tax Law § 3030[c][5]).

C. In order to be granted an award of costs, it must be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030(c)(5)(A). Furthermore, any such grant is subject to the limitation of Tax Law § 3030(c)(5)(B), which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was "substantially justified." Clearly, petitioner Eastern Paramedics, Inc., has satisfied all the criteria of being the "prevailing party" in this matter per Tax Law § 3030(c)(5)(A)(i), inasmuch as it substantially prevailed on the most significant issue presented, that the medical supplies purchased by petitioner were, in fact, directly and predominantly used in the designated empire zones. Thus, the critical remaining question is whether the Division's position was "substantially justified" (Tax Law § 3030[c][5][B]), for if it was, then petitioner may not be treated as a prevailing party and is ineligible for an award of costs and fees.

D. Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this State law (***see Matter of Levin v.***

Gallman, 42 NY2d 32, 396 NYS2d 623[1977]; ***Matter of Ilter Sener***, Tax Appeals Tribunal, May 5, 1988). A position is substantially justified if it has a reasonable basis in both fact and law (***see, Information Resources, Inc. v. United States***, 996 F2d 780, 785, 93-2 US Tax Cas ¶ 50,519 [1993]), with such determination properly based "on all the facts and circumstances surrounding the case, not solely upon the final outcome" (***Heasley v. Commissioner***, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412 [1992]; ***Phillips v. Commissioner***, 851 F2d 1492, 1499, 88-2 US Tax Cas ¶ 9431 [1988]). This determination of "substantially justified" is properly made in view of what the Division knew at the time the position was taken, i.e., when the notice was issued (Tax Law § 3030[c][8][B]; ***see DeVenney v. Commissioner***, 85 TC 927, 930 [1985]). The fact that the notice was cancelled by the administrative law judge is a factor to be considered. However, this action does not preclude a finding that the Division's position was substantially justified at the time the notice was issued (***see Heasley v. Commissioner***).

E. The Division's position is substantially justified where it pursues litigation in close legal questions presented on novel issues (***Spriggs v. United States***, 660 F Supp 789, 87-2 US Tax Cas ¶ 9392 [1987], ***affd*** 850 F2d 690 [1988]; ***United States v. Wilkinson***, 628 F Supp 29, 85-2 US Tax Cas ¶ 9825 [1985]). The issue in this matter as to the whether supplies received and stored within a Qualified Empire Zone and then consumed outside the zone were used directly and predominantly inside the Empire Zone and, thus, not subject to tax had never been decided. Notably, petitioner provided no case law as authority on the issue. Clearly, the Division is entitled to seek judicial guidance in situations where, as here, the statute gives little direction or where the issue is one of first impression (***Blanco Investments & Land, LTD v. Commissioner***, 55 TCM 677 [1988]). It is clear that the Division's position was substantially justified.

F. The Division has correctly noted that Rural/Metro, and not petitioner, is the entity that paid the legal fees in this matter. As Eastern has not incurred any expenses in this proceeding, Tax Law § 3030(a) is inapplicable. In addition, since Eastern, and not Rural/Metro, was the successful litigant in this proceeding, Rural/Metro cannot be considered the prevailing party for purposes of Tax Law § 3030(a). Assuming, arguendo, that Rural/Metro could be considered a prevailing party, Tax Law § 3030(c)(5)(a)(ii)(II) would require that petitioner allege and prove that Rural/Metro's net worth did not exceed seven million dollars and did not have more than 500 employees when the proceeding was commenced. In its application for costs, petitioner has not presented any documentation or any evidence other than the managing director's affidavit upon which a conclusion could be reached concerning the net worth or number of employees of Rural/Metro Corporation. However, a review of the general business corporation combined franchise tax returns of Rural/Metro Corporation (Form CT-3-A) for the fiscal years ended June 30, 2007, June 30, 2008 and June 30, 2009, indicate that the net worth of Rural/Metro Corporation exceeded $7 million at the time the civil action was filed.

G. The application for costs of petitioner, Eastern Paramedics, Inc., dated November 1, 2010 is denied.

DATED: Troy, New York
February 17, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE