STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW YORK COMMUNICATIONS COMPANY, INC.	:	DETERMINATION DTA NO. 825586
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Periods Ended December 31, 2004 through 2009.	:	

Petitioner, New York Communications Company, Inc., filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the periods ended December 31, 2004 through 2009.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on October 2, 2014 at 10:30 A.M., with all briefs to be submitted by February 24, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared by the Kridel Law Group (James A. Kridel, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

ISSUE

Whether petitioner is a provider of telecommunication services such that its sales are subject to tax under Tax Law § 186-e.

FINDINGS OF FACT

1. Petitioner, New York Communications Company, Inc., sells and services two-way radio communications systems and radios (two-way radios or walkie-talkies) for public safety entities located in the Hudson Valley area. These entities include the New York State Police, the New

York State Department of Transportation, the New York State Department of Environmental Conservation, as well as local police, fire and highway departments. Petitioner also provides specialized mobile radio communication or dispatch services to its customers.

2. A two-way radio or walkie-talkie is a "half-duplex" device; a device that requires a person to push a button on the device to talk to a person on another walkie-talkie and to release that button in order to listen to the person on the other end.

3. In order to accomplish this communication, petitioner programs the walkie-talkies so that two (or more) walkie-talkies operate on the same frequency or channel (a closed group). For the most part, everyone in the group can hear each other talk.

4. A walkie-talkie cannot call a telephone and a telephone cannot call a walkie-talkie.

5. Petitioner also sells mobile units that are installed in vehicles.

6. In addition to its sales and leases of walkie-talkies, petitioner owns repeaters. A repeater functions like an amplifier, by strengthening a voice signal and transmitting that signal over greater distances and around mountains and large buildings. Essentially, a person speaks into the walkie-talkie and the voice is transmitted to a repeater. The repeater strengthens the voice signal and then transmits the voice to the person on the ground using another walkie-talkie. Repeaters allow walkie-talkies to operate over a larger geographical area than they could on their own.

7. Most repeaters are 36 to 50 inches tall and resemble filing cabinets. They are kept within buildings on mountaintops. One repeater can accommodate up to 100 customers.

8. Walkie-talkies can and do operate without the use of a repeater. This operation is called talk-around or direct. Not all customers use petitioner's repeaters. At the time of the

hearing, approximately 40% of petitioner's business was related to the use of repeaters, although it is unclear whether that percentage is representative of its business during the audit period.

9. Petitioner also offers its customers installation services, replacement and loaner services, and licensing services.

10. Petitioner is regulated by the Federal Communications Commission (FCC). It filed Form 499-A, Telecommunications Reporting Worksheet, with the FCC. Petitioner is not a common carrier because its walkie-talkies do not connect to the Public Switched Telephone Network (PSTN) as they do not receive a dial tone.

11. Petitioner incorporated in New York in 1956. During the audit period, petitioner filed Forms CT-3, General Business Corporation Franchise Tax Returns, and Forms CT-3M/4M, General Business Corporation MTA Surcharge Returns, in New York. According to the Forms CT-3, petitioner conducted 100% of its business in New York. According to the Forms CT-3M/4M, petitioner conducted approximately 83 to 87 percent of its business in the metropolitan commuter transportation district (New York City and certain surrounding counties).

12. As a result of information received from the FCC, the Division began an audit of petitioner. The FCC provided a database of all companies that filed its Form 499-A. The Division compared companies that filed Form 499-A to those companies that filed excise tax returns pursuant to Tax Law § 186-e. In order to determine whether those companies that filed FCC Form 499-A should also be filing excise tax returns, the auditor developed a questionnaire that was sent to companies and individuals, including petitioner.

13. In response to the questionnaire, petitioner responded in the affirmative that it furnished or sold any telecommunications services and stated that it sold "SMR specialized mobile radio communications services (dispatch) for mission critical departments and other

agencies." Based upon the responses by petitioner to the questionnaire and other research by the auditor, the auditor determined that petitioner was taxable under Tax law § 186-e because it provided two-way radio services in New York State.

14. In order to calculate what portion of petitioner's business was subject to excise tax, the auditor requested a breakdown of revenue by different revenue streams. Petitioner provided a breakdown of its annual sales for the audit years. This information was separated into two main categories: repeater sales and "other sales services customers with own systems/frequencies." These two categories were further broken down into subcategories with dollar amounts shown for each fiscal year ended June 2004 through June 2009. The auditor determined that only those amounts in the repeater category, less amounts for equipment sales included in that category, were subject to tax because Tax Law § 186-e imposes excise tax on sales of telecommunication services, not property. The auditor then converted the amounts shown on a fiscal year basis in the repeater category to a calendar year basis.

15. After the auditor determined what income was taxable in each audit year, she used petitioner's corporation franchise tax and MTA surcharge returns to determine the portion of that income that should be allocated to New York. The auditor then applied the applicable percentages and rates and computed the amounts of excise tax and MTA surcharge due for each audit year. Penalties were imposed for failure to file excise tax returns.

16. On January 4, 2013, the Division issued a Notice of Deficiency, L-038963648, to petitioner. The amount of tax due in the Notice of Deficiency has subsequently been recalculated to a decreased amount of $113,275.00, which reflects certain, separately stated sales of equipment, associated with the repeater services, since such sales are not taxable.

CONCLUSIONS OF LAW

A. Effective January 1, 1995, Tax Law § 186-e imposes an excise tax on the sale of any telecommunication service, to be paid by every provider of telecommunication services. A provider of telecommunication service is any person, corporation or other entity that furnishes or sells telecommunication services, regardless of whether such activities are the main business of the person, corporation or other entity or are only incidental thereto. Tax Law § 186-e(1)(g) defines, in part, "telecommunication services" as:

> "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof . . . ."

B. The facts in this case are not at issue. The question raised is whether communication that requires the use of repeaters constitutes telephony within the meaning and intent of Tax Law § 186-e such that the income derived by the repeaters is subject to tax as a telecommunication service.

The fundamental rule of statutory construction is to effectuate the intent of the Legislature (***Matter of 1605 Book Center, Inc. v. Tax Appeals Trib.***, 83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994]). Whether any particular service is taxable is properly construed pursuant to the rule applicable when determining whether a transaction is subject to taxation at all (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***reargument denied*** 37 NY2d 816 [1975]). Regarding tax statutes in particular, it is axiomatic that ambiguity therein must be "construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication" (***Matter of American Cyanamid & Chem. Corp. v. Joseph***, 308 NY 259, 263 [1955]).

Petitioner's repeaters transmit voice through the use of radio wave. A person speaks into a walkie-talkie and the voice is transmitted to a repeater. The repeater strengthens the voice signal and then transmits that voice signal to a person on the ground using another walkie-talkie. The Division argues that tax is imposed on providers of any transmission of voice through the use of radio wave; thus, the repeater income is taxable. Petitioner states that its repeater services do not fall within the definition of telephony because its walkie-talkies are not similar to telephones. Petitioner states that the statute is intended to tax telecommunication services by the use of telephones, which involves establishing a connection with the Public Switched Telephone Network (PSTN). Moreover, petitioner asserts that case law demonstrates that the excise tax in issue is intended to tax common carriers and petitioner is not a common carrier. Petitioner argues that because it is not a common carrier and its repeater does not access the PSTN, its sales are not telephony within the meaning of the Tax Law.

C. In the ***Matter of Easylink Servs. Intl., Inc.*** (Tax Appeals Tribunal, July 27, 2009, ***confirmed*** 101 AD3d 1180 [2012], ***lv denied*** 21 NY3d 858 [2013]), the Tax Appeals Tribunal held that "[a]n important test for whether an activity constitutes *telephony* or *telegraphy* is whether the activity constitutes transmission of the type conducted by an ordinary telephone or telegraph company." Clearly, the use of the repeater to transmit voice over walkie-talkies is not the type of transmission conducted by an ordinary telephone company.

The facts demonstrate that there is no connection to the PSTN: no dial tone, no ability to place a call to any number - just the ability to communicate with the holder of the other walkie-talkie. As petitioner points out, the decision in the ***Matter of GTE Spacenet Corp. v. New York State Dep't of Taxation & Fin.*** (223 AD2d 468 [1996]) proves instructive.

In ***GTE Spacenet***, the court refused to tax telephony service where the service was not connected by wire, as expressly set forth in the statute. The court mentioned that the law in effect during the taxable period in that case specifically taxed telephony service connected by wire, which prompted the amendment to the statute in order to reflect technological advances in providing telephony or telegraphy.

As a result of the legislation enacted in 1995, the Division undertook a study of telecommunications and recommended changes. A report, *Improving New York State's Telecommunications Taxes*, created by the Division's Office of Tax Policy, for the Governor and the Legislature, supports the interpretation of the statute as argued by petitioner. A section of this report, Definition of Telecommunications Services, states that:

> "The legislation also clarified the definition of telecommunications services in the new Section 186-e tax to clearly include services provided using any transmission means such as wire, satellites, fiber-optic, laser, microwave or radiowave. The definition also provides examples of the types of services subject to tax. The old Section 186-a language referred to 'utilities' that delivered telephony or telegraphy services through, or furnished by means of 'wires.' The new Section 186-e was not intended to change the tax base. Rather, it was intended to modernize the definition and prevent the positions put forth in *GTE Spacenet* 'wires' [footnote omitted] case from becoming precedent for future periods" (*Improving New York State's Telecommunications Taxes*, Final Report and Recommendations by the New York State Department of Taxation and Finance, January 1997, p. 13).

The Division's own publication indicates that changes to the statute were a result of technological advances for the provision of traditional telephony and telegraphy services and not an attempt to broaden the scope of the tax to apply to a provider such as petitioner who is not selling telephony.

D. Furthermore, the Division argued that the definition of telephony, as set forth in Newton's Telecom Dictionary (26th ed [2011]), supports its position. It is noted that this publication is an industry definition of terms. The definition of telephony states, in part, that:

> "The science of transmitting voice, data, video or image signals over a distance greater than what you can transmit by shouting. . . . For the first hundred years of the telephone industry's existence, the word telephony described the business the nation's phone companies were in. It was a generic term. In the early 1980s, the term lost fashion and many phone companies decided they were no longer in telephony, but in telecommunications - a more pompous sounding term that was meant to encompass more than just voice. . . . In the early 1990s, as computer companies started entering the telecommunications industry, the word telephony was resurrected" (***id***, at 1142).

This definition is consistent with petitioner's position that the word telephony was meant to cover the nation's phone companies and common carriers of telephony and not the type of communication service that is provided by its repeaters. To expand the excise tax to cover the instant petition is too broad an application and not consistent within the meaning and intent of the statute. As such, the repeater income is not subject to tax as a sale of telecommunication services under Tax Law § 186-e.

E. The petition of New York Communications Company, Inc. is granted and the Notice of Deficiency L-038963648, dated January 4, 2013, is canceled.

DATED: Albany, New York
August 13, 2015

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE