

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GERIMEDIX, INC.	:	DECISION
	:	DTA NO. 820438
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 March 1, 1996 through	:	
February 28, 1999.	:	

Petitioner Gerimedix, Inc., 421 Van Brunt Street, Brooklyn, New York 11231, filed an exception to the order of the Administrative Law Judge issued on July 13, 2006. Petitioner appeared by Leonard Fein, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori Antolick, Esq. and Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Gerimedix, Inc., is a New York based corporation that sells medical supplies to nursing homes, doctors and hospitals.

Following an audit, the Division of Taxation (“Division”) issued a Notice of Determination to petitioner, dated December 13, 2002, asserting a tax due of \$286,123.87, plus interest, for the period March 1, 1996 through February 28, 1999. The Division’s determination that additional tax was due was premised on its conclusion that certain medical equipment and supplies purchased for use in performing medical services for compensation were not exempt from sales tax. Petitioner challenged this conclusion as well as aspects of the test period audit methodology agreed to by petitioner and employed by the Division in this matter.

Following the issuance of the Notice of Determination, petitioner filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services, and on December 31, 2004, a Conciliation Order (CMS No. 195945) was issued which sustained the statutory notice. On March 21, 2005, petitioner filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order which sustained the statutory notice.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, on January 24, 2006, at the conclusion of which the parties entered into a settlement agreement in the amount of \$170,000.00 and signed a Stipulation of Discontinuance. The settlement agreement encompassed the entire audit period in issue and all categories upon which the tax was calculated

and assessed, but the parties did not allocate the \$170,000.00 to specific portions of the assessment.

On March 17, 2006, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioner, which sought costs in the amount of \$51,762.00.

These costs consisted of the following:

Professional Fees

Leonard Fein, CPA Specialist in Sales Taxes	\$13,300
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Gerald Wiseberg CPA Specialist in Systems and Audit Techniques	5,880
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Processing Costs

Martin Oestrich Controller

Work performed in preparation of 4900 pages of analytical reports including programming, algorithms, analysis, verification and data mining from 4 years of records of the Company consisting of over 50,000 invoices, 12000 items across over 300 customers. Including compilation and examination of original documents

Presented at Court to all parties	29,700
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Clerical assistance to compile, sort, label, photocopy, assemble, collate, cover and box	1,500
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Printing	987
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Photocopying	195
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Supplies-paper, banker boxes, labels, covers	<u>200</u>
	<u>\$51,762</u>

The services rendered by Mr. Fein were for “preparation of conciliation proposals, appeals preparations and briefs, and all other work necessary for DTA #820438” billed for 133 hours at \$100.00 per hour, for a total of \$13,300.00. The supporting detailed summary of

services performed by G. Wiseberg indicate 205.5 hours at \$40.00, which does not coincide with the amount of the summary above. Although 9.5 hours of G. Wiseberg's time preceded the issuance of the Notice of Determination, no explanation was provided for the difference. The services performed by Marty Oestreich were detailed and summarized, showing 825 hours at a billing rate of \$36.00 per hour, for a total of \$29,700.00.

Petitioner submitted a copy of its 2004 U.S. Corporation Income Tax Return, Form 1120, with its balance sheet per books on page 4. The balance sheet as of December 31, 2004 shows total assets at \$5,760,363.00, liabilities of \$4,936,991.00 and shareholder's equity of \$823,372.00.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner was not entitled to costs in this case. Initially, the Administrative Law Judge noted that the costs sought must be for reasonable litigation and administrative costs incurred in connection with the administrative proceedings which in this case were determined to be costs incurred after the issuance of the Notice of Determination. However, the petitioner bore the burden to demonstrate that it was a prevailing party in this proceeding and the Administrative Law Judge stated that petitioner did not prove that it substantially prevailed with respect to either the amount in controversy or with respect to the most significant issue. The Administrative Law Judge also noted several defects in petitioner's application for costs, to wit, failure to establish a net worth less than \$7 million, failure to demonstrate that it had fewer than 500 employees and a lack of itemization of petitioner's attorney's fees as required. Accordingly, the Administrative Law Judge denied the application for costs.

ARGUMENTS ON EXCEPTION

Petitioner states in its exception that it had fewer than 500 employees and had less than \$7 million in assets. Petitioner claims that it submitted detailed records of costs, including reasonable fees and professional attorney fees for costs incurred after the Notice of Determination issued on December 13, 2002. Petitioner states that it is a prevailing party and should be able to recover its costs from December 13, 2002 to the date of execution of the Stipulation for Discontinuance of Proceeding.

In opposition, the Division points out that petitioner did not substantially prevail with respect to the amount in controversy or with respect to the most significant issue presented. Furthermore, the Division states that the position of the Commissioner was substantially justified. The Division agrees with the determination of the Administrative Law Judge and requests that her order be sustained.

OPINION

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 a 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 (*see*, Tax Law § 3030[c][2][B]). The statute also provides that fees for the services of an individual who is authorized to practice before the

Division of Tax Appeals are treated as fees for the services of an attorney (*see*, Tax Law § 3030[c][3]).

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 an individual whose net worth did not exceed two 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 subdivision (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.

* * *

(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]).

The first determination that needs to be made is whether petitioner has established that it is a prevailing party. Petitioner disagrees with the conclusion of the Administrative Law Judge. It argues that the Administrative Law Judge misunderstood its position. Petitioner states that its original tax assessment was approximately \$286,000.00 of which the correct amount of the assessment, in its opinion, was more properly in the range of \$134,000.00. Yet, it agreed to settle the case for \$170,000.00. Thus, petitioner argues that it was “75.32% successful at court, which led to the Stipulation of Discontinuance” (Petitioner’s brief in support, p. 1). It appears that this percentage was calculated by petitioner’s belief that the original assessment should have been reduced by \$152,000.00 and actually was settled at a reduction of \$116,000.00. Petitioner estimates that his final settlement amount resulted in a reduction of 75.32% (i.e., \$116,000.00/\$152,000.00).

We disagree with petitioner’s argument. Primarily, petitioner’s explanation of the reduction as a percentage in its favor is skewed. The proper analysis begins with petitioner’s concession of owing almost half of the original tax assessment. Petitioner’s reflection of its settlement percentage at 75.32% is inaccurate because it already conceded the accuracy of \$134,000 which amount petitioner did not even factor into its percentage calculation.

Moreover, as pointed out by the Administrative Law Judge, the settlement agreement was silent as to a monetary breakdown with respect to the individual issues involved. Therefore, petitioner failed to show that it prevailed on any particular or significant issue.

Even absent proof that it was the prevailing party, it is determined that the commissioner was substantially justified in issuing the Notice of Determination. As set forth above, the tax assessment was \$286,000.00 as set forth in the Notice and petitioner agreed to pay \$170,000.00. Therefore, we conclude that petitioner is not entitled to costs since the Commissioner's position was substantially justified.

With respect to the other defects in the application, petitioner failed to show that it was a corporation whose net worth did not exceed \$7 million dollars and which did not have more than 500 employees when this proceeding was commenced pursuant to Tax Law § 3030(c)(5)(A)(ii)(II) and it failed to provide an itemized statement from its representative stating the actual time expended and the rate at which such fees were computed pursuant to Tax Law § 3030(c)(5)(A)(ii)(I). Thus, we affirm the order of the Administrative Law Judge denying petitioner's application for costs in this proceeding.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gerimedix, Inc. is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The application for costs of Gerimedix, Inc. is denied.

DATED: Troy, New York
May 31, 2007

/s/Charles H. Nesbitt

Charles H. Nesbitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner