STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	DETERMINATION 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.	:	

Petitioner Stat Equipment Corp. 664 Bluepoint Road, Holtsville, New York 11742, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1985 through 1988.

Petitioner Bi-County Ambulance and Ambulette Transport Corp., 664 Bluepoint Road, Holtsville, New York 11742, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1985 through 1987.

A consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 18, 1994 at 9:15 A.M., with all briefs submitted by August 4, 1994. Petitioners appeared by Christopher L. Doyle, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

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

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.

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.

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").

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

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.

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

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

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

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

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.

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.

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.

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.

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

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

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 State was reduced to $15,341.00, plus interest.

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

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

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

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

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.

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

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.

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.

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.

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.

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.

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.

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

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.

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.

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

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.

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.

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.

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

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

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".

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.

Petitioners were required to carry medical malpractice insurance.

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.

CONCLUSIONS OF LAW

A. For the privilege of exercising its corporate franchise, of doing business, of employing capital, or of owning or leasing property in this State in a corporate or organized capacity, or of maintaining an office in this State, every domestic or foreign corporation (except those corporations subject to tax under sections 183 through 186 and such other corporations as are specified in Tax Law § 209.4) must pay an annual franchise tax to this State (Tax Law § 209.1). Sections 183 and 184 of Article 9 impose a franchise tax and an additional franchise tax, respectively, upon corporations and associations formed for or principally engaged in the conduct of aviation, railroad, canal, steamboat, ferry, express, navigation, pipeline, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business or formed for or principally engaged in the conduct of two or more such businesses, and other domestic corporations or associations principally engaged in the conduct of a transportation or transmission business.

B. Whether a given corporation is properly classified and held subject to taxation under Article 9 or under Article 9-A is to be determined from an examination of the nature of its business activities. Neither the laws under which petitioners were incorporated nor the provisions of petitioners' certificate of incorporation are controlling (see, Matter of McAllister Bros. v. Bates, 272 App Div 511, 72 NYS2d 532, lv denied 272 App Div 979, 73 NYS2d 485; Matter of Holmes Electric Protective Co. v. McGoldrick, 262 App Div 514, 30 NYS2d 589,

affd 288 NY 635). In Matter of McAllister Bros. v. Bates (supra), the court set forth a de facto test with respect to such determination as follows:

> "[I]t has firmly been established that classification for franchise tax purposes is to be determined by the nature of [the corporation's] business and that the purposes for which the corporation was organized are immaterial. This rule with respect to classification for franchise tax purposes applies especially to corporations organized under the general business corporation laws which have within their certificates of incorporation a wide variety of chartered powers." (Matter of McAllister Bros. v. Bates, supra, at 536 [emphasis added].)

The term "transportation" means "any real carrying about or from one place to another" (Matter of Joseph A. Pitts Trucking, State Tax Commn., July 18, 1984; see, Matter of RVA Trucking v. State Tax Commn., 135 AD2d 938, 522 NYS2d 689, 690).

C. In the instant matter, petitioners argue that they were principally engaged in providing medical services; that the Division mistakenly relied on the relatively insignificant transportation element of their activities; that the Legislature has determined that ambulance services are emergency medical services, not transportation services; and that from the perspective of petitioners' customers, petitioners provide medical services, not transportation services. Although the arguments are well reasoned, the facts of this case belie petitioners' conclusions.

Petitioners cited the Tax Appeals Tribunal case of Capitol Cablevision Systems (Tax Appeals Tribunal, June 9, 1988), wherein it was stated:

> "It 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 Systems, Inc. v. Gallman, 39 NY2d 428; Matter of Holmes Electric Protective Company v. McGoldrick, 262 AD 514, affd 288 NY 635; Matter of McAllister Bros. v. Bates, 272 AD 511.)"

Petitioners do not deny that a portion of their business pertains to the transporting of persons with special medical needs. Petitioners argue that the provision of medical services by various levels of professionals using sophisticated life support systems is their primary business activity. However, if it were not for the fact that petitioners provide a transportation service which offers to move patients in need of medical support during transport, their business would

not exist. The medical services were provided to their customers only in conjunction with the transportation service and only as an ancillary service to the transportation service.

It is true that petitioners employ a physician and skilled medical professionals, as well as follow authorized protocols/medical procedures as dictated by county authorities and hospital physicians and are regulated by the Department of Health, but those factors do not alter the raison d'etre of petitioners' business, i.e., facilitating the movement of persons with medical needs from one point to another.

Petitioners point out that article 30 of the Public Health Law is entitled "Emergency Medical Services" and that ambulance service was defined therein as "an essential public health service." From that language, petitioners conclude that the Legislature views ambulance services not as transportation services, but as public health services. But a closer examination of the language reveals contraindications.

The regulation promulgated pursuant to Public Health Law, article 30, § 3002(2), 10 NYCRR 800.3(f), defines "ambulance service" as:

> "a person engaged in providing emergency medical services and the transportation of sick, disabled or injured persons by motor vehicle, aircraft or other form of transportation to or from facilities providing hospital services."

Public Health Law § 3001(2) defines an "ambulance service", in similar terms, as a corporation engaged in providing emergency medical care and the transportation of sick or injured persons by motor vehicle, aircraft or other forms of transportation to, from, or between general hospitals or other health care facilities. Further, as the Division properly noted, petitioners' argument that they were more closely regulated by the New York State Department of Health than the Department of Transportation is not persuasive since the type and number of industries served by petitioners is immaterial.

Petitioners are best described as providers of medical transportation services wherein the critical business activity is transportation, as noted by petitioners in their corporation tax returns submitted into evidence. Clearly, petitioners hold themselves out to the public as providers of medical transportation services, which is consistent with the finding that they operate a

transportation business.

Equally unpersuasive is petitioners' argument that the breakdown of their services on their bills and in payments from third parties, such as insurance companies, health maintenance organizations and Medicare/Medicaid, demonstrates that their services are predominantly "medical expenses" as opposed to transportation services. It is conceded that the transportation element of their bills was the least of the charges. However, the courts have found that transportation receipts include receipts for services directly connected with such transportation (People ex rel NY & Albany Lighterage Co. v. Cantor, 239 NY 64) and services provided incident to the provision of those transportation services are transportation-related receipts (RVA Trucking v. State Tax Commn., supra, 522 NYS2d at 690). Therefore, the charges for medical services were incident to the transportation provided by petitioners, even though more than 50% of petitioners' receipts were from medical, albeit transportation-related services. Hence, all of such receipts were properly subject to the franchise tax imposed by Tax Law §§ 183 and 184.

As pointed out in the Division's brief, petitioners do not engage in non-transportation business activities, i.e., provide medical services or equipment, apart from the transportation services sold to their customers. Although invoices broke down the component parts of the services rendered by petitioners, those parts were never sold apart from the primary business activity of transportation services.

Petitioners argue that if the patients receiving services from them wanted mere transportation to a hospital, they would have contacted a taxi or an ambulette service, both of which are far less expensive than an ambulance. However, it is determined that petitioners merely provide a different type of transportation service, i.e., one which provides basic and advanced life support incident to its primary function of transportation.

Finally, petitioners argue that standards of statutory construction require a determination that petitioners are not engaged in a transportation business, borrowing from the language in the Tribunal's decision in Capitol Cablevision Systems. However, petitioner's reliance upon

Capitol Cablevision Systems is misplaced. It may have been that the language of Tax Law §§ 183 and 184 was vague when applied to the cable television industry. In fact, the cable television industry was not specifically enumerated in sections 183 and 184 because it did not exist when the statute to tax transportation businesses was originally enacted in 1880 or amended in 1930. In contrast, though there may have been no statutory or regulatory definition of a transmission business, there has been ample judicial interpretation of Tax Law §§ 183 and 184 of what constitutes a transportation corporation (see, People v. Cantor, supra; People ex rel. Connecting Terminal R. Co. v. Miller, 178 NY 194, 82 NYS 582; People ex rel Peter J. Curran Funeral Service Co. v. Graves, 257 App Div 888, 12 NYS2d 153, lv denied 281 NY 888; RVA Trucking v. State Tax Commn., supra), and petitioners are determined to fall within that definition.

D. The petitions of Stat Equipment Corp. and Bi-County Ambulance and Ambulette Transport Corp. are denied and the 16 protested notices of deficiency, dated July 10, 1991, are sustained.

DATED: Troy, New York
February 2, 1995

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE