

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(31)S
Sales Tax
July 14, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080807A

Petitioner Mark S. Klein, Hodgson Russ, LLP, 140 Pearl Street, Suite 100, Buffalo, New York 14202-4040, asks whether (1) his client (Company) is making sales of medical equipment and related supplies, as described below, or is providing a nontaxable service; and (2) Company's purchases of equipment, supplies, and maintenance services for the equipment are subject to sales tax.

We conclude that Company is providing a nontaxable service to the hospital rather than selling or renting medical equipment and supplies. Company's purchases of medical equipment, supplies, and maintenance services for the equipment are subject to tax under Tax Law §1105(c)(3).

Facts

Pursuant to a contract between Company and a healthcare facility located in New York State (Hospital):

1. Company grants a license to Hospital for the use of Company's facility for the purposes of conducting diagnostic imaging services.
2. Company pays all costs associated with the utilities necessary for operating the facility.
3. Company grants a license to Hospital for the use of furniture, fixtures, and medical equipment located at the facility. The equipment consists of a magnetic resonance imaging (MRI) machine and computerized tomography (CT) machine. Company must keep the equipment in good repair.
4. Company provides certain administrative services for the facility that include:
 - i. General management services (day-to-day operations);
 - ii. Fiscal reporting services;
 - iii. Providing supplies;
 - iv. Scheduling services;
 - v. Personnel services (i.e., technicians, receptionists, secretaries, clerks, bookkeeping and management personnel).

Company provides the facility and pays for all utilities associated with the facility. It provides the technicians who conduct the MRI and CT scans. It provides the MRI and CT machines as well as all supplies consumed in conducting the scans. Supplies include dyes that are either injected into or ingested by patients, empty syringes, and syringes filled with sodium chloride. Company provides management and bookkeeping services to ensure that the facility is run efficiently. Company provides all scheduling and secretarial services in order to coordinate a patient's care with Hospital. In short, Company provides all

items necessary for Hospital to effectively render imaging services to its patients. Hospital then bills the patient for such services.

The personnel provided by Company pursuant to the contract remain Company's employees. Company is responsible for recruiting, training, managing, supervising, compensating and terminating the personnel. Company is also responsible for all taxes and insurance necessary with respect to the personnel. However, the contract provides that "[a]t such times as the Leased Personnel are providing services on [Hospital's] behalf, [Hospital] shall have authority and responsibility for [1] the supervision and control of the Leased Personnel [i.e., the employees] (while providing services on [Hospital's] behalf); [2] determining the means and methods by which each leased personnel provides services hereunder." With respect to medical technicians, the contract provides that Hospital "shall be solely responsible for supervising all medical technicians performing Imaging Services on [Hospital's] patients as required under applicable law, including but not limited to, 10 NYCRR § 89.4(a)." ¹

Hospital managerial staff is generally not present at the facility. Hospital radiologists must administer dyes to patients at the facility whenever dyes are needed for the imaging procedures. Hospital radiologists or other physicians are not required to be present when Company's technicians operate the equipment and conduct the MRI and CT scans. Hospital physicians provide protocols or directions to technicians indicating what parts of the body should be scanned, the proper angle at which the scan should be made, and other specifications for the scan.

In consideration for the items provided by Company pursuant to the contract, Hospital pays Company a monthly license fee that is based on the applicable Medicare rate for the technical component for each MRI or CT scan. In other words, for each scan conducted on a patient, Hospital pays Company a set amount. This charge remains constant regardless of the amount of time it takes to complete the scan or the amount of supplies used in conducting the scan. According to the contract, the license fee is allocated as follows:

1. Premises - 20%
2. Equipment - 13%
3. Supplies - 17%
4. Services - 10%
5. Personnel - 40%

The contract between Company and Hospital specifically states that "Such payment shall be inclusive of any and all sales tax associated therewith." Due to the number of scans that occur daily, Company does not invoice Hospital for any of the scans it conducts. Instead, Hospital sends Company a monthly report detailing the scans that have occurred at the facility. Hospital pays Company the applicable license fee based on this report. Occasionally Company spot checks Hospital's report to ensure that Hospital has accurately reported all scans.

Hospital is not an exempt organization under Tax Law §1116(a)(4).

¹ It should be noted that the New York State Department of Health regulations were amended after the contract was made in 2001. 10 NYCRR 89.2 currently covers the practice of radiologic technology under the supervision of a licensed practitioner.

Analysis

The issue is whether Company is renting medical equipment and related supplies to Hospital pursuant to their contract, or is providing medical (diagnostic imaging) services. Rentals of medical equipment and supplies by Company to Hospital would be taxable. The exemption from tax under Tax Law §1115(a)(3) for medical equipment and supplies does not apply to sales at retail for use in performing medical and similar services for compensation. The performance of diagnostic imaging services by Company would not be taxable. Diagnostic imaging services are not enumerated taxable services.

When a license to use equipment includes the services of an operator, the transaction is presumptively the sale of a service, rather than the rental of tangible personal property, if dominion and control over the equipment remain with the equipment owner. Indicia that the owner retains dominion and control are: (i) the owner maintains the right to hire and fire the operators; (ii) the owner or its employees use their own discretion in performing the work; (iii) the owner retains responsibility for operating the equipment; and (iv) the owner directs the work, and pays all operating expenses, including operators' wages and insurance. Whether a transaction is a sale or rental of equipment or is the sale of a service must be determined in accordance with the facts and circumstances of the particular transaction and the provisions of the contract between the parties. *See* 20 NYCRR §541.2(p)(2).

In *Greene & Kellogg, Inc. v Chu*, 134 AD2d 755 (3d Dept 1987), the court looked at the taxpayer's billing methods in concluding that the taxpayer was providing medical services (inhalation therapy) rather than selling or renting medical equipment and supplies. In that case, the amounts billed to the hospitals were a fixed percentage of the hospital's charges to the patient. The court noted that the hospitals were charged without regard to the quantity of equipment or supplies. The court further noted that "[c]harges were not made periodically but only when therapy was offered to patients, and patients were billed for the charges. There was no accounting as to what services, supplies or equipment were provided to any particular patient." The taxpayer had amended its contracts to refer to the equipment transactions as leases and to indicate that 30% of the amounts billed to the hospital would be allocated to the sale or rental of equipment and supplies. However, the court concluded that there was substantial evidence to support the determination that the taxpayer was providing medical services rather than selling or renting medical equipment and supplies. Accordingly, the taxpayer's purchases of equipment and supplies were subject to sales tax.

In the present case, Company's billing methods resemble the billing methods used by the taxpayer in *Greene & Kellogg, supra*. Company's fees are not based on the quantity of equipment and supplies provided to Hospital, but rather on the Medicare rate per scan performed on a patient. Company and Hospital do not account for the supplies or equipment provided to a particular patient. As in *Greene & Kellogg*, Company's contract allocates 30% of the fees billed to Hospital to supplies and equipment.

The technicians that operate the medical equipment in this case are Company's employees. Company is responsible for hiring and firing the technicians, paying their wages, and providing their insurance. Company is responsible for operating expenses such as utilities in connection with the equipment, and for maintaining the equipment. The contract between the parties provides that Hospital is solely responsible for supervising technicians performing imaging services as required under applicable law, including 10 NYCRR §89.4(a). However, this regulation, as it existed when the contract was made, provided that physicians are not required to oversee radiologic technicians in measuring and positioning patients, and in operating equipment. The current regulations do not appear to have taken this discretion away from technicians. Petitioner states that Hospital's physicians are not required to be present when Company technicians perform the scans.

Based on the billing methods used by Company and the other facts in this matter, Company is providing nontaxable diagnostic imaging services to Hospital rather than renting medical equipment and supplies. This conclusion is consistent with the holding in *Greene & Kellogg, supra*, and with the indicia of service transactions in 20 NYCRR §541.2(p)(2). Accordingly, Company's monthly fees charged to Hospital are not subject to sales tax.

Company's purchases of medical equipment and supplies are subject to sales tax under Tax Law §1105(a). The exemption from tax under Tax Law §1115(a)(3) does not apply because Company purchases the medical equipment and supplies for use in performing medical and similar services for compensation. *See Greene & Kellogg, supra*. Taxable supplies include empty syringes and syringes filled with sodium chloride that are purchased by Company. *See* 20 NYCRR §528.4(h), Example 1. However, Company's purchases of dyes that are ingested by or injected in patients for purposes of diagnostic imaging are exempt from tax. The dyes are drugs or medicines, or products consumed for the preservation of health, and are exempt under Tax Law §1115(a)(3) regardless of whether they are purchased for use in performing medical and similar services for compensation. *See* 20 NYCRR §528.4(b), Example 6.

Company's purchases of medical equipment and supplies are not exempt from sales tax under Tax Law §1105-B or 1115(a)(12). Company uses the medical equipment and supplies in providing diagnostic imaging services to Hospital rather than producing tangible personal property for sale. *See Advanced Technology Laboratories, Inc.*, Adv Op Comm T&F, March 6, 1992, TSB-A-92(19)S.

Company's purchases of maintenance services for the medical equipment are taxable under Tax Law §1105(c)(3). The exemption under Tax Law §1115(g) for services performed on medical equipment does not apply in this case because Company's purchases of the medical equipment for use in performing medical and similar services for compensation are taxable.

It should be noted that Company's purchases at retail of furniture and fixtures, other than fixtures purchased on an installed basis that are capital improvements, are subject to sales tax under Tax Law §1105(a).

DATED: July 14, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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