

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

TSB-A-13(21)S  
Sales Tax  
July 19, 2013

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101214C

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its mobile medical services sold to medical facilities are exempt from New York State and local sales and use taxes.

We conclude that, because attending physicians at Petitioner's customers' sites direct Petitioner's employees in the use of Petitioner's equipment, Petitioner has made retail sales of its equipment to its customers and Petitioner must collect sales tax on the charges for the equipment. Petitioner's separately stated charges to its customers for providing employees to operate its equipment would not be taxable. Petitioner's charges for the equipment are not exempt under Tax Law § 1115(a)(3), because Petitioner's customer uses the equipment to provide medical services for compensation.

**Facts**

Petitioner submitted the following facts. Petitioner provides certain medical equipment and staff to its customers, which are typically health care facilities or doctors. Petitioner enters into a written "Services Agreement" contract ("Agreement") with its customer. The Agreement specifically details the responsibilities of Petitioner and its customer. For consideration, Petitioner will provide to its customer, on a non-exclusive basis, the services of Petitioner's staff to operate Petitioner-owned equipment, at the customer's facility. ("Non-exclusive basis" means that Petitioner may provide the same staff and equipment to its other customers in various states, under separate contracts with similar terms.) Generally, the equipment is used in an out-patient setting and therefore overnight stays by the customer's patients are not needed. Petitioner's equipment varies based upon the type of patient testing or treatment to be performed at the customer's facility, but the testing is generally some type of imaging, such as x-ray or ultrasound, or both. An example of a treatment procedure is extracorporeal shockwave lithotripsy.

Petitioner's employees deliver the equipment to the customer's facility and set it up in an agreed upon location. Petitioner's employees also test and quality check the equipment to ensure that it is functioning properly. At the end of each day of service, Petitioner's employees remove the equipment from the customer's facility and deliver it to the next customer's location based upon the employee's route.

A properly licensed technician operates the equipment while it is at the customer's facility. This licensed technician is an employee or subcontractor of Petitioner. Under the Agreement, only Petitioner's employees or subcontractors may operate the equipment. The Agreement also requires Petitioner to ensure that its personnel that operate the equipment are properly trained, qualified, and

licensed to operate the equipment. Petitioner must also ensure that all services its employees provide are rendered in a professional manner and in accordance with all applicable facility policies and procedures, in addition to compliance with 10 NYCRR § 89.2. The only other person involved with a procedure performed using Petitioner's equipment is the attending physician, who generally is not an employee of Petitioner's customer if the customer is a health care facility but who has rights to admit patients to the health care facility for medical care. This attending physician is not an employee or subcontractor of Petitioner and does not operate Petitioner's equipment.

At the time the test or procedure is to be performed, Petitioner's technician employee would ask the attending physician about the "targeting" of the area of interest of the test or procedure and the strength of the X-ray or other type of imaging tool being used or, for example, the number of shocks to be applied to a kidney stone in an extracorporeal shockwave lithotripsy procedure. The attending physician advises the technician about the target location, what strengths should be used, or, for example, the number of shocks for a kidney stone. The attending physician is in charge as to the test or procedure and has the final say about these matters. The technician operates under the supervision of the attending physician and cannot override what the attending physician wants to do. Thus, the technician will not perform the test or procedure without the approval of the attending physician, as Petitioner cannot take responsibility for the patient's care.

Petitioner's Agreement with its customer also requires Petitioner to maintain the equipment in good working condition. Therefore Petitioner maintains its own repair and maintenance department to address any operating problems that may arise as its employees operate the equipment at the customer's facility. If Petitioner's equipment breaks down, Petitioner's service engineers address and repair the problem. The Agreement specifically provides that only Petitioner's employees or subcontractors may operate the equipment. Thus, the equipment is at all times under the control of the Petitioner for purposes of maintenance, repair, and operation.

Petitioner's typical Agreement with its customer also provides that it is a contract for services, not a lease, and no agency, employment, partnership or joint venture is intended to be created by the Agreement. In addition, Petitioner will not be responsible for failure to provide services as a result of conditions created by its customer, and the Agreement will be governed by the laws of the state where the services will be performed.

## **Analysis**

Retail sales of tangible personal property are subject to sales tax, unless specifically exempted or excluded from tax. Sales, other than for resale, of certain enumerated services are also subject to sales tax. Likewise, uses of tangible personal property and certain services are subject to compensating use tax, unless an exemption or exclusion applies. For sales and use tax purposes, "sale" includes an outright sale where title transfers to the customer; it also includes a lease, rental, or license to use if possession, but not title, passes to the customer. *See* Tax Law, §§ 1101(b)(5), 1105(a) and (c), 1110.

In this case, Petitioner charges its customer for providing certain medical equipment and for the services of its employees to operate the equipment at the customer's site. The question is

whether that transaction constitutes a retail sale of tangible personal property and a separate charge for the service of Petitioner's employee to operate the equipment. Or, is the transaction for a medical service only, and, if so whether that is an enumerated taxable service. If it is, the question becomes whether an exemption or exclusion applies.

Petitioner's medical equipment is tangible personal property. Petitioner's employees deliver and set up the equipment at the customer's facility. Petitioner's Agreement provides that only Petitioner's employees or subcontractors can operate the equipment. In addition, Petitioner must repair and maintain the equipment and uses its own employees to do so. The Agreement makes clear that Petitioner's customer is not Petitioner's agent, partner, or joint venturer. Thus, under the Agreement, the customer does not operate Petitioner's equipment and the customer has no relationship to Petitioner other than as purchaser. Whether the subject transaction is a sale of tangible personal property together with a separate sale of an operating service, or the transaction is a sale of a medical service, depends on whether custody or control of Petitioner's equipment has been transferred to the customer when it is at the customer's site.

Sales Tax Regulations § 526.7(e)(4), (5), and (6) provide as follows with respect to the definition of "sale" in the nature of a rental, lease, or license to use. The transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred to the customer: custody or possession of the tangible personal property, actual or constructive; or the right to custody or possession of the tangible personal property; or the right to use, or control or direct the use of, the tangible personal property. It is not essential for a transfer of possession to include the right to move the tangible personal property which is the subject of a rental, lease, or license to use. *See, e. g.*, 20 NYCRR § 526.7(e)(5), examples 12, 13, and 14.

When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates. *See, e. g.*, 20 NYCRR § 526.7(e)(5), example 15.

In this case, the parties' Agreement provides that it is for services and is not a lease. However, the parties' written characterization of the transaction as not being a lease does not control over the facts of the transaction. Petitioner delivers the equipment to its customer's facility at an agreed date and time. Thus, whether this delivery constitutes a sale of the equipment turns on whether the customer obtains either actual or possessive custody or control over the equipment or the right to use or direct the control or use of the equipment and whether the customer directs Petitioner's employees in using the equipment. The contract also provides, and Petitioner's facts indicate, that only its employees or subcontractors may or do operate the equipment. In addition, Petitioner delivers, sets up, and removes the equipment, and Petitioner is solely responsible to maintain and repair the equipment. The customer cannot and does not do any of those things.

Petitioner's facts indicate that the only person other than Petitioner's employees or subcontractors involved with the testing or treatment procedure is the attending doctor who is generally not an employee of the health care facility/customer. Petitioner's facts also indicate that,

while Petitioner's employee operates the equipment, it is the attending physician that controls the targeting and the strength and timing of exposure, or the number of shocks for one or more kidney stones in the case of an extracorporeal shockwave lithotripsy procedure. Thus, based on these facts, while Petitioner's employee directly controls Petitioner's equipment, the employee does so at the direction of the attending physician. The attending physician is not related to Petitioner, but is involved with the procedure because of his or her relationship to Petitioner's customer and the customer's patient. Thus, Petitioner has transferred to its customer possession of the equipment, because the attending physician directs Petitioner's employee in the operation and use of the equipment. Because petitioner has transferred control of the equipment, Petitioner has made a sale of the equipment to its customer, and sales tax is due on Petitioner's charges to its customers for the sale (rental, lease, or license to use) of the equipment under Tax Law § 1105(a) of the Tax Law, unless an exemption applies. Petitioner's separately stated charges for its employees to operate the equipment while it is at the customer's site would not be taxable.

The only relevant exemption under these facts would be in Tax Law § 1115(a)(3), which exempts from sales and use taxes the purchase or use of medical equipment, but not if the medical equipment is purchased at retail for use in performing medical and similar services for compensation. Here, Petitioner's customers use the equipment to perform medical or similar services for compensation. Thus, the § 1105(c)(3) exemption does not apply and Petitioner must collect tax from its customers for the separately stated charge for the equipment, but not on its separately stated charges for its employees to operate the equipment.

In addition, because the equipment is taxable medical equipment, Petitioner's payment of wages, salary, or other compensation to its own employees to maintain, service, or repair its equipment would not be taxable, under the last paragraph of § 1105(c). But Petitioner would be required to pay sales or use tax under § 1105(c)(3) if it pays others (including any contractor or subcontractor) to maintain, service, or repair its equipment.

DATED: July 19, 2013

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.