

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-98(41)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S971231G

On December 31, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from InSight Health Services Corp. as successor in interest to Maxum Health Services Corp., 4400 MacArthur Blvd., Suite 800, Newport Beach, California 92660.

The issues raised by Petitioner, InSight Health Services Corp., are:

1. Whether Petitioner's purchases and leases of tractor-trailer combinations are subject to State and local sales and use taxes.
2. Whether Petitioner's purchases and leases of medical diagnostic imaging equipment (the "Equipment") qualify for the resale exclusion under Section 1101(b)(4)(i)(A) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner makes Equipment available to customers on a "shared" basis in various states including New York. In a shared arrangement, Petitioner transports Equipment to customers in a particular geographic area on a regular basis (e.g., once a week, twice a month, etc.). Under written "Equipment Lease Agreements," the customers lease the Equipment for a scheduled time period (e.g., per day or per month) so that they may provide diagnostic imaging services to their patients.

The Equipment is permanently installed on a trailer which is towed by a tractor to the customer's location (the Equipment/trailer combinations are hereinafter referred to as "mobile units"). Petitioner's trailers are vehicles, not propelled by their own power. Petitioner's tractors are motor vehicles designed and used as the power unit in combination with trailers. Petitioner's tractor-trailer combinations without the Equipment installed weigh in excess of 26,000 pounds. Petitioner's tractor/mobile unit combinations weigh in excess of 75,000 pounds. Petitioner's tractors and mobile units are appropriately registered under the motor vehicle laws of New York and the other states in which they operate.

Petitioner acquires, either by purchasing or leasing, Equipment along with trailers and tractors from unrelated manufacturers or from affiliated corporations who, in turn, purchase or lease the property from manufacturers. Petitioner acquires each mobile unit with the intention that it will be used exclusively in connection with specific customers in New York State and other states.

In addition to leasing Equipment, Petitioner may also provide upon a customer's request, under a separate Services Agreement, a technical staff to operate the Equipment under the supervision of a licensed radiologist provided by Petitioner's customers. Petitioner also keeps a daily record of all patients receiving imaging services, provides marketing services and develops quality control programs under its Services Agreement. The fees paid under the Services Agreement are charged on either a per scan (i.e., patient scan), per day or per month basis. Petitioner does not provide to every customer technical staff or other incidental services, and customers are free to sign only the Equipment Lease Agreement without agreeing to the Services Agreement.

As part of its Petition for Advisory Opinion, Petitioner furnished copies of an Equipment Lease Agreement and a Service Agreement.

Pursuant to the Equipment Lease Agreement, Petitioner shall be responsible for transporting the Equipment to and from the hospitals. In addition, Petitioner, at its expense, shall arrange for maintenance and repair of the Equipment as may be necessary to keep the Equipment in good working order during the Initial Term and any Extended Terms. Moreover, the hospital acknowledges that title to the Equipment shall at all times be vested in Petitioner, and no right, title or interest in the Equipment shall pass to the hospital and the Equipment shall at all times be and remain personal property.

The Service Agreement provides that the hospital shall maintain on its staff at all times that imaging services are scheduled, one or more board-certified radiologists licensed in the State of New York, with training and experience in diagnostic imaging services to supervise the performance of the imaging services and the operation of the Equipment. Such licensed radiologists shall be solely responsible for the determination of the services to be provided to each patient and the clinical supervision of the technical staff, including, without limitation, interpretation of the test results.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on the receipts from retail sales (including rentals) of tangible personal property.

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five.

Section 1101(b)(5) of the Tax Law defines the terms "sale, selling or purchase," in part, to mean:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, . . . for a consideration, or any agreement therefore, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(26) Tractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair, provided such vehicle is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousand pounds.

Section 526.7(e)(4) and (6) of the Sales and Use Tax Regulations provides, in part:

(4) "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:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

* * *

(6) 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.

Example 15: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the

company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator. The taxable receipt excludes the operator's wages.

Section 528.26 of the Sales and Use Tax Regulations states, in part:

(b) Definitions. The following terms shall apply for purposes of this section.

* * *

(6) Qualifying vehicle is a tractor, trailer or semitrailer, provided such qualifying vehicle is used in combination with any vehicles where the gross vehicle weight of such combination exceeds 26,000 pounds. Trailers and semitrailers which otherwise meet the requirement for exemption when combined with a tractor are considered a qualifying vehicle though combined with a truck.

(c) Purchases. (1) Generally, the purchase or lease of a qualifying vehicle or property installed on such vehicle for its equipping, maintenance or repair may be made without the payment of sales tax provided the purchaser gives to the vendor a properly completed Exemption Certificate for Tractors, Trailers and Semi--Trailers within 90 days of the delivery of the property.

Example 1: An individual engaged in the transportation of property purchases a new tractor from a dealer. The purchase agreement calls for the tractor to be fully equipped for long haul situations. Such optional equipment includes the addition of a sleeper unit, an AM-FM stereo radio, splash guards, roof-mounted wind deflector and a built-in toolbox with hand tools included. The purchaser intends to use the tractor in combination with a trailer which when loaded will exceed 26,000 pounds gross vehicle weight. The purchase of the tractor and all optional equipment is exempt from sales tax provided the purchaser gives the vendor a properly completed Exemption Certificate for Tractors, Trailers or Semi-Trailers, within 90 days of the delivery of the property.

Section 541.2(p) of the Sales and Use Tax Regulations provides, in part:

(1) The terms "rental, lease and license to use" refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle; and

(v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

Opinion

In Maxum Health Services Corp., Adv Op Comm T&F, March 31, 1993, TSB-A-93(22)S, it was concluded that pursuant to Section 1115(a)(26) of the Tax Law and Section 528.26(c)(1) of the Sales and Use Tax Regulations, the tractor and trailer leased by the petitioner, excluding the MRI Units, were exempt from sales and use taxes, but the MRI Unit did not fall within the purview of equipment installed on such vehicle, and was not covered by such exemption. The phrase "property installed on such vehicle for its equipping" as set forth in Section 528.26(c)(1) of the Sales and Use Tax Regulations was held to refer to "optional equipment" commonly added to vehicles such as sleeper units, radios, splash guards, wind deflectors, etc.

In this case, Petitioner acquires, either by purchasing or leasing, tractor-trailer combinations weighing in excess of 26,000 pounds for use in transporting its Equipment which is permanently installed on the trailer to customers in a particular geographic area on a regular basis. Petitioner leases the Equipment to its customers for a scheduled period of time so that they may provide diagnostic imaging services to their patients. In addition to leasing the Equipment, Petitioner may also provide, upon a customer's request and under a separate Services Agreement, a technical staff to operate the Equipment under the clinical supervision of a licensed radiologist provided by Petitioner's customers.

With respect to issue "1", under Section 1115(a)(26) of the Tax Law, the purchase of tractors, trailers, or semi-trailers and any property installed on such vehicles for their equipping, maintenance or repair, provided the vehicles are used in combination and have a gross weight in combination in excess of 26,000 pounds, is exempt from sales and compensating use taxes. In accordance with Section 528.26(c)(1) of the Sales and Use Tax Regulations and Maxum Health Services Corp., supra, magnetic resonance imaging systems installed on such vehicles do not come within the purview of the exemption for property to be used for "equipping" the vehicles. Therefore, where Petitioner purchases or leases tractor-trailer combinations which weigh in excess of 26,000 pounds, such purchases or leases of tractor-trailer combinations, without regard to the magnetic resonance imaging system installed thereon, are not subject to sales and compensating use taxes. Petitioner's purchase or lease of the Equipment would not, however, be exempt from tax under Section 1115(a)(26) of the Tax Law.

Concerning issue "2", pursuant to Section 526.7(e)(4) and (6) of the Sales and Use Tax Regulations, the rental of tangible personal property is deemed to be a "sale" where a transfer of possession has taken place. This happens when the right to use, or control or direct the use of the tangible personal property is granted to the lessee by the lessor. Under Petitioner's Services Agreements with its customers, the customers control the use of the Equipment in order to provide diagnostic imaging services to their patients. Since Petitioner's customers control the use of the Equipment, Petitioner's rental of the Equipment to its customers is deemed a sale. Petitioner's leases of Equipment to its customers under its Equipment Lease Agreement also qualify as sales. Thus, under the facts presented, Petitioner uses the Equipment solely to make sales. In accordance with Section 1101(b)(4)(i)(A) of the Tax Law, tangible personal property purchased exclusively for resale (or rental) as such is not subject to sales tax. Therefore, Petitioner may purchase or lease the Equipment exempt from tax as a purchase for resale.

Since Petitioner's customers use the Equipment to provide medical and similar services for compensation, Petitioner's sales (leases) to its customers are not exempt from sales and use taxes under Section 1115(a)(3) of the Tax Law, and Petitioner should collect tax unless the customer is an exempt organization described in Section 1116(a) of the Tax Law.

DATED: July 1, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.