

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UNIVERSITY MEDICAL IMAGING, P.C.	:	DECISION
	:	DTA NO. 816312
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 August 1, 1993 through April 30, 1996.	:	

Petitioner University Medical Imaging, P.C., c/o William R. Nojay, Esq., 800 First Federal Plaza, Rochester, New York 14614, filed an exception to the determination of the Administrative Law Judge issued on July 8, 1999. Petitioner appeared by Saperston & Day, P.C. (William R. Nojay, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, 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. Oral argument, at petitioner's request, was heard on June 15, 2000 in Troy, New York.

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

ISSUE

Whether petitioner's purchase and lease of diagnostic imaging equipment was exempt from sales tax pursuant to Tax Law § 1115(a)(12) because such equipment was used in the production of tangible personal property for sale.

FINDINGS OF FACT

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

Petitioner, University Medical Imaging, P.C., filed an application for refund of sales and use taxes dated August 20, 1996 seeking a refund of \$150,645.01 in sales tax paid on the purchase and lease of medical equipment during the period August 1, 1993 through April 30, 1996. Such equipment included diagnostic imaging equipment for general x-ray, magnetic resonance imaging (MRI), Computerized Axial Tomography (CAT Scan), ultrasound and mammography. The refund claim also included tax on payments made under service and maintenance contracts for the equipment. Petitioner's refund claim asserted that the equipment was exempt as medical equipment pursuant to 20 NYCRR 528.4(e)(2).

By letter dated January 15, 1997, the Division of Taxation ("Division") denied petitioner's claim in full.

Petitioner is a professional service corporation organized in 1989 under Article 15 of the Business Corporation Law. Petitioner's Certificate of Incorporation states:

The purposes for which the Corporation [petitioner] is formed are to engage as a professional service corporation in the practice of medicine as authorized by Article 15 of the Business Corporation Law and to render those professional services to the public which a duly licensed physician may render under the laws of the State of New York.

Petitioner was organized by radiologists employed as full-time faculty members of the Department of Radiology of the University of Rochester School of Medicine and Dentistry ("the Department"). Petitioner's by-laws state that its shareholders must be licensed to practice

medicine and must be “full-time members of the Department of Radiology of the University of Rochester School of Medicine and Dentistry and provide clinical services therein.” Petitioner currently has about 25 shareholders, all of whom are qualified under these by-law provisions.

Petitioner’s by-laws also provide that its directors and officers must be shareholders and licensed to practice medicine. The by-laws also state that petitioner’s president must be the Chair or Acting Chair of the Department.

Petitioner’s by-laws designate the president as petitioner’s chief executive officer and charge the individual holding that office with “the general management of the affairs of [petitioner].”

Petitioner, the University of Rochester Medical School and the Department have an agreement whereby the University authorizes and assigns faculty members of the Department to work at the site of petitioner’s operations. The radiologists so assigned are members of the Department and are petitioner’s shareholders. The radiologists are members of a partnership called Radiologists of the University of Rochester and are, as noted, full-time employees of the University. The radiologists are not employees of petitioner. University of Rochester radiologists are present at petitioner’s facility Monday through Friday from approximately 8:00 A.M. until 5:00 P.M.

Petitioner and the University have also agreed to share in petitioner’s profits.

Petitioner’s facility is located in a freestanding building in a suburb of Rochester, New York. Petitioner has its own entrance to the building. Petitioner’s facility has a reception area, separate rooms for each of the different types of imaging equipment used by petitioner, and a work area for the University of Rochester radiologists, which includes an office and a reading

area where the medical images produced by petitioner are illuminated and are read and interpreted by the radiologists.

Petitioner produces medical images on acetate film using the following equipment and technologies:

a.) **General radiography**, commonly called an x-ray, uses ionizing radiation to produce images of bony structures inside the body. The technician, called a radiologic technologist, directs the patient to lie on a table or, in the case of a chest x-ray, to stand against a wall stand. The technician uses special equipment and exposes the radiographic film to the desired body part. The exposed film is then developed into an image by the technologist using various chemicals.

b.) **Ultrasound** uses sound waves to produce images. A technician, called an ultrasonographer, covers the appropriate area of the patient's body with a gel and then proceeds to scan the area by placing a hand-held instrument, called a transducer, against the patient's skin, slowly passing over the area of interest. The transducer produces high frequency sound waves which strike various organs and tissues and echo back to the transducer. Different tissues and organs produce different echoes. A computer transforms these different echoes, or frequencies, into an image which is then printed on x-ray film.

c.) **CAT (Computerized Axial Tomography)** also uses x-rays to produce images. With the CAT scan, however, the patient, lying on a table, moves through a device which has an x-ray tube in it. The technician views the image on a computer monitor and programs the slice thickness, the dose of radiation required, and the specific area of interest. The table then moves in the prescribed increments. At each such "slice" the x-ray tube focuses a narrow beam of x-

rays across the prescribed section while rotating around the patient's body. By rotating the tube, the technician can acquire multiple images at different angles creating a cross-sectional image. The computer converts the images so obtained for printing on x-ray film.

d.) **MRI (Magnetic Resonance Imaging)** uses a large magnet, radio waves, and a computer to produce detailed images of the body. The patient is placed on a table and the technician programs a scanner to perform several different types of scans, checking each scan before proceeding to the next. The technician will film each of the images, off the monitor, using a laser camera. When a sheet of film is full (20 images), the film is sent to the processor. The processor will run the film through various tanks of chemicals in order to develop it. It is not uncommon to have over 100 images of a particular area.

Approximately 60 percent of petitioner's medical images are x-rays, approximately 10 percent are ultrasound images, and the remaining 30 percent are equally divided between CAT Scan and MRI images.

As noted, all of the medical images produced by petitioner are on acetate film. Petitioner owns or leases all of the equipment used in the production of the images. Petitioner also purchases, prior to its use, all chemicals and film used in the production of the images. Petitioner pays sales tax on its purchases of such supplies.

Until 1994 petitioner also produced images using mammography equipment. Payments on petitioner's mammography equipment were made during the period at issue and are part of petitioner's refund claim. Documents submitted by petitioner in support of its claim indicate that \$4,415.40 of petitioner's refund claim arises from purchases of mammography equipment.

Petitioner offered no testimony of the manner in which images are produced using this equipment.

Patients are referred to petitioner by their physician or other designated medical provider. Under New York law, with the exception of mammography, only persons licensed to provide medical or similar services may order medical imaging. As noted above, petitioner no longer produces images using mammography equipment. Accordingly, petitioner does not produce any medical images unless requested by a properly licensed medical provider.

The process by which petitioner produces medical images begins with the order, similar to a prescription, placed with petitioner by the patient's medical provider. Such an order will specify the body part that the provider wants imaged. If the requesting medical provider has a question regarding the best way to get an image of a particular body part or complications in a particular case, the provider may consult one of the University of Rochester radiologists. In such a case, the requesting medical provider and the radiologist will reach an agreement as to the most acceptable protocol, or series of images, to achieve the desired result. The radiologist would then write the agreed-upon protocol on the order for the patient. The order is given to the technician at the time of the imaging procedure who will follow it as written. In contrast, if the request is for a standard image, such as a chest x-ray, and the patient presents no complications, there may be no discussion between the requester and the radiologist. In such a case, the requesting physician would place the order, the patient would arrive at the facility, and the technician would get the image in accordance with a standard protocol. Standard protocols are suggested by the manufacturer of the imaging equipment. All protocols are subject to change by the radiologist or requesting medical provider and commonly are changed to suit the needs of a particular patient.

Ultimately, the requesting physician, in consultation with the University of Rochester radiologist is responsible for selecting the protocol. Petitioner's technicians do not determine the protocol.

Upon arrival at petitioner's facility for an imaging procedure, the patient provides an employee of petitioner with basic registration and insurance information. The patient will then fill out a "check sheet" by which petitioner obtains a medical history of the patient. A technician then reviews the patient's completed check sheet and explains the procedure to the patient. If the patient's answers raise any questions for the technician, he or she will consult with a University of Rochester radiologist. In such a case, the radiologist, possibly in consultation with the patient's primary care physician, will determine whether the procedure will continue. For certain imaging procedures, the patient must be injected with a dye prior to the procedure. For a small percentage of procedures the patient is injected with dye after an initial imaging procedure has been completed. In those cases, further images are taken after the injection. All such injections are performed by the University of Rochester radiologists who are present at petitioner's facility. The physician and not petitioner is compensated for performing the injection. Any claims of malpractice in connection with the injections would trigger the physician's malpractice policy. Petitioner does not carry medical malpractice insurance.

Once the patient has been prepared, the technician performs the specific imaging procedure as ordered by the requesting medical provider. The technician follows the protocol set by the requester and the radiologist. The technician does not use any discretion in determining the protocol to be used.

There is no radiologist or other licensed medical provider present in the room at the time the technician operates the imaging equipment. During that time, the technician is responsible to observe and report the patient's condition and to report any unusual occurrences.

After the imaging procedure has been completed, the technician does a quality control check of the film that has been created. The film is then delivered to the University of Rochester radiologist present at petitioner's facility who interprets the image and provides diagnostic services. Petitioner's technicians may not presume that the medical image is appropriate and the procedure completed until the radiologist reviews the image. The technicians do not interpret the images and do not discuss diagnosis or treatment with the patient.

Petitioner also typically delivers a copy of the image to the requesting medical provider.

As part of his or her diagnostic services, the radiologist writes a report summarizing his or her findings and transmits this report to the requesting medical provider.

Petitioner has about 15 employees. About nine of petitioner's employees are technicians and six perform clerical duties. The technicians operate petitioner's medical imaging equipment. All of petitioner's technicians have been trained in the operation of the equipment. The technicians that operate petitioner's x-ray and CAT scan equipment are licensed by New York State in the operation of such equipment. Petitioner's employees are supervised by an office manager. The office manager is an experienced technician in all modalities and is charged with the day-to-day supervision of petitioner's employees and the operation of the equipment. None of petitioner's employees are licensed to practice medicine and none of petitioner's employees do practice medicine as that term is defined in section 6521 of the Education Law.

At the time of petitioner's organization, petitioner's status as a professional service corporation was reviewed by the State Departments of Health, Education and Insurance, as well as the State Attorney General's Office. At that time, petitioner's representatives fully disclosed the nature of petitioner's business activities and the fact that petitioner would not be employing any persons licensed to practice medicine. None of these state agencies objected to petitioner's use of the professional corporation form of business.

Petitioner's technicians do not provide any diagnosis or interpret medical images in any manner. No radiologist or other person licensed to provide medical services directly oversees petitioner's technicians in the operation of the imaging equipment.

Radiologists of the University of Rochester do not order imaging procedures from petitioner.

There is no contract between petitioner and the Radiologists of the University of Rochester for the radiologists to provide diagnostic services to petitioner's patients.

Petitioner bills its patients directly or through their insurance company. Petitioner bills on a per procedure basis, regardless of the number of scans performed. Petitioner does not charge sales tax for its procedures. Petitioner bills a single fee for both the medical imaging and the diagnostic services provided by the Radiologists of the University of Rochester. The Radiologists of the University of Rochester have assigned their payment for services to petitioner. According to petitioner such a "global bill" is required because State Insurance Department regulations and Medicare and Medicaid requirements allow freestanding imaging centers such as petitioner to submit only one bill for service. Upon receipt of payment from the patient or his or her insurance company petitioner distributes the portion of the bill attributable to

the radiologist's services back to the radiology group. Petitioner does not retain any portion of the radiologists' diagnostic fee and the radiologists do not share in petitioner's fee. The apportionment of the "global fee" charged by petitioner is made in accordance with insurance company fee schedules for such services.

Petitioner is required by law to retain copies of the medical images it produces for a period of several years. Petitioner has approximately 100,000 images in its files. Control of the medical images resides with the patient and his or her medical provider. Petitioner may not copy, transfer, sell or dispose of the medical images in its files without the authorization of the patient. Even after the mandatory storage period has expired, petitioner must obtain the consent of the patient in order to dispose of the image. There is no value in such images for petitioner. Petitioner does not include its archive of medical images on its financial statements either as an asset or a liability.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioner failed to establish entitlement to the production exemption set forth in Tax Law § 1115(a)(12). The Administrative Law Judge stated that petitioner needed to demonstrate that the tangible personal property produced by it was for sale as a separate product (*see, Matter of Delta Sonic Car Wash Sys.*, Tax Appeals Tribunal, November 14, 1991). In this case, the tangible personal property, i.e., the medical images, were not sold as a separate product. In fact, the Administrative Law Judge found that all medical images were used by the University of Rochester radiologists to perform diagnostic services. Furthermore, the Administrative Law Judge stated that it was the medical image produced by petitioner coupled with the radiologist's report that were transferred to the

requesting medical provider. Additionally, the Administrative Law Judge noted that petitioner billed its patients a single charge for both the imaging and diagnostic components of this service. Therefore, the Administrative Law Judge determined that petitioner produced the medical images as part of the delivery of medical services to its patients.

ARGUMENTS ON EXCEPTION

Petitioner disagrees with the conclusion reached by the Administrative Law Judge. Petitioner states that it does not perform medical services. In fact, petitioner claims that it would be against the law for it to be a provider of medical services.

Moreover, petitioner argues that the Administrative Law Judge erred in his conclusion that petitioner produced medical images as part of the provision of a radiological service and that it did not separately sell the tangible personal property produced to its patients as required by Tax Law § 1115(a)(12).

Lastly, petitioner alleges that its patients are not purchasing a medical service from it of which the production of the medical image is but a part. Petitioner states that there is no evidence in the record to support this conclusion; rather, the evidence shows that the medical images produced are stored and used for future reference.

In response, the Division agrees with the determination rendered by the Administrative Law Judge. The Division states that the record reflects that petitioner is providing a medical service. The Division explains that the patient does not enter petitioner's facility looking for a medical image. Rather, the Division argues that the patient visits petitioner's facility in order to receive a diagnosis for whatever ails the patient.

The Division also asserts that the medical image is not produced for a taxable sale and, thus, is not entitled to the production exemption since the statute requires that there has to be a product sold. The Division emphasizes that petitioner's billing methods clearly indicate that petitioner is providing a medical service.

OPINION

We begin our analysis by reviewing the relevant statutes applicable in this situation. Tax Law § 1105(a) imposes a tax on the retail sale of tangible personal property. Tax Law § 1115(a)(12) exempts from the tax imposed under section 1105(a) machinery or equipment for use in the production of tangible personal property for sale.

On the contrary, tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale (20 NYCRR 526.6[c][7]). Tax Law § 1105(c) enumerates several services which are subject to sales tax. Reviewing the enumerated taxable services, it is clear that medical or similar services is not listed and, thus, such services are not subject to sales tax. Therefore, since medical or similar services are not taxable services, the medical equipment and supplies purchased for use in performing medical or similar services for compensation are not entitled to an exemption from sales tax (Tax Law § 1115[a][3]; 20 NYCRR 528.4[h][1]).

Subparagraph (2) of 20 NYCRR 528.4(h) states:

medical services for human beings include but are not limited to the practices of medicine, dentistry, physical therapy, chiropractic, nursing, podiatry, optometry and radiology, whether performed by a private practitioner, clinical laboratory, hospital, nursing home, ambulance service, clinic, or health maintenance facilities.

Subparagraph (1) of 20 NYCRR 528.4(e) defines *medical equipment* as:

machinery, apparatus and other devices . . . which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings.

Furthermore, “[t]o qualify, such equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity” (20 NYCRR 528.4[e][2]).

From our review of the record, it is apparent that petitioner is engaged in the delivery of medical services as described in the above-quoted regulations contrary to the position set forth by petitioner.¹ When a patient enters petitioner’s facility, the patient’s expectation is not to leave with a medical image, but rather, to be diagnosed so that treatment, if applicable, can be sought. At no time does a patient enter the facility and leave with the medical image just taken as if the medical image was the product sold to a customer.² Obviously, the medical image is worthless to the individual patient in the absence of an accompanying diagnosis by either a physician located in petitioner’s facility or by the patient’s referring physician who may be located in another location.

We disagree with petitioner that the procedure performed in its facility is analogous to the taking of a photo (*see*, Oral Arg. Tr., pp. 27-28). The record reflects many aspects of the procedure performed at petitioner’s facilities which support our conclusion that petitioner was

¹Petitioner strenuously objects to the characterization that it is involved in the *practice of medicine* as defined in the Education Law. However, it is not alleged that petitioner is practicing medicine, but rather, petitioner plays an important role in the overall delivery of medical services to a patient that comes to its facility by providing such patient with a medical image which is required by a requesting medical provider in order to diagnose an ailment.

²At no point has petitioner demonstrated or, in fact, alleged, that it has collected sales tax on the medical images it has produced.

involved in the delivery of medical services. We note that petitioner billed its patients a single charge for the imaging and diagnostic services. As pointed out by the Administrative Law Judge, petitioner produced medical images as part of the provision of a radiological service and did not separately sell medical images to its patients. Moreover, as established through the testimony of Mr. Bausch, in certain imaging procedures, the requesting physician would give the order on how the image is to be created (*see*, Hearing Tr., pp. 72-74). Petitioner's technician obtains a medical history from the patient prior to conducting the imaging process and, if any questions arise, the technician consults with a University of Rochester radiologist (*see*, Hearing Tr., p. 44). In cases where the injection of dye is necessary, the technicians do not perform the injections, but rather, the University of Rochester radiologists perform the injection (*see*, Hearing Tr., pp. 79-82). Lastly, the imaging process is not completed until a review of the image is performed by a radiologist to ensure that the proper image was captured (Hearing Tr., p. 36 [lines 4-9]; *see also*, pp. 65-66).

Therefore, we find that petitioner was involved in the delivery of medical services and, accordingly, we affirm the determination of the Administrative Law Judge that petitioner has failed to demonstrate entitlement to the production exemption for its purchase and lease of diagnostic imaging equipment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of University Medical Imaging, P.C. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of University Medical Imaging, P.C. is denied; and

4. The denial of petitioner's refund claim dated January 15, 1997 is sustained.

DATED: Troy, New York
December 7, 2000

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner