STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LINCARE, INC.	:	DETERMINATION DTA NO. 823971
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 March 1, 2005 through February 29, 2008.	:	

Petitioner, Lincare, Inc., filed a petition 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 March 1, 2005 through February 29, 2008.

On April 18, 2012, petitioner, appearing by Ryan, Inc. (Mark Weiss, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs submitted by January 31, 2013, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's purchases of oxygen cylinders were purchases for resale and, therefore, not subject to tax as a retail sale.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings below, except numbered paragraph 5, which is not a finding of fact.

1. During the period March 1, 2005 through February 29, 2008 (audit period) petitioner provided oxygen systems to its customers for in-home use.

2. Oxygen systems could be an oxygen concentrator system, a stationary liquid oxygen system, a high pressure (gas) system, and a portable liquid oxygen delivery system. In addition, petitioner provided a backup unit that a customer could use if the primary unit (oxygen concentrator system) failed. The oxygen cylinders at issue are part of the stationary liquid oxygen unit, high pressure unit, portable liquid oxygen unit and backup unit and are made of aluminum.

3. With regard to its oxygen system, petitioner only transacted with customers who sought oxygen and purchased the oxygen from petitioner using a U.S. Department of Health and Human Services form entitled "Certificate of Medical Necessity - Oxygen" that was signed by their physician. This form set forth the names, addresses and telephone numbers of the patient, physician and supplier, the physician's diagnosis, patient's needs and a narrative description of the items, accessories and options ordered, the supplier's charge and the medicare allowance for same. Also included was the physician's statement of the oxygen flow rate prescribed for the patient.

4. One way petitioner delivered oxygen to its customers was with oxygen cylinders, which petitioner would retrieve from its customers when empty and replace with full oxygen cylinders. Petitioner did not deliver empty oxygen cylinders to its customers. Although petitioner's customers had possession of the cylinders, petitioner retained ownership.

5. Petitioner provided its customers with a written, month-to-month agreement that required a customer to pay a monthly fee, which was set according to a monthly invoice. The monthly fee was dictated by federal regulation, and although the fee did not change during the billing period, the fee was originally set based upon the physician-prescribed number of liters of oxygen required by individual patients. If oxygen was required at a flow rate above 4 liters per minute, the fee schedule amount was increased by 50 percent; if less than 1 liter per minute, the fee schedule amount was decreased by 50 percent. There was also an adjustment for portable oxygen equipment based on the prescribed oxygen flow rate.

6. Petitioner charged a fixed, monthly fee because many of its customers received Medicare benefits, and federal regulations required petitioner to charge patients for use of the oxygen cylinders that delivered oxygen. Petitioner, in that regard, billed and was reimbursed for the sale or rental of oxygen cylinders under Medicare, Medicaid, private insurance, or a private pay arrangement. The monthly fee did not vary based on usage,[1] and petitioner charged for a full month regardless of whether the customer/patient used the oxygen cylinders for the full month. Petitioner, except in instances of sales of oxygen cylinders, did not separately charge for oxygen contents or any service related to the oxygen cylinders.

7. The monthly rental fee included refilling the oxygen cylinders. There were no separate charges for oxygen when cylinders were exchanged or refilled. If an oxygen cylinder was empty, petitioner replaced it with one filled with oxygen without charging its customer an amount in addition to the monthly charge. Further, petitioner did not charge its customers an extra fee when it replaced unused oxygen cylinders.

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[1]This does not conflict with the previous statement that the fee could be adjusted based on the amount of oxygen prescribed *prior* to the fee being set.

8. On rare occasions, petitioner sold oxygen cylinders to its customers. If a customer wanted a purchased cylinder to be filled, petitioner charged the customer for the oxygen. Those instances were rare and were the only situation in which petitioner charged a customer for oxygen separately. In those situations, petitioner characterized the revenue from the sales of oxygen cylinders as sales revenue in its general ledger.

9. During the audit period, petitioner did not pay sales tax on its purchase of the oxygen cylinders; it depreciated the cost of the cylinders and carried them on its books as fixed assets. It recognized rental revenue from the fees it received for the rental of oxygen cylinders in its general ledger.

10. The Division of Taxation (Division) audited petitioner for the audit period and determined that petitioner maintained adequate records. The Division's examination of sales records indicated additional taxable sales of $7,460.61 and additional sales tax due of $615.50 based on jurisdictional errors. Additionally, it was determined that petitioner owed additional tax on expense purchases in the sum of $6,905.78.

11. The review of capital records determined additional taxable capital of $1,485,684.20 or additional use tax due of $121,498.57. Of this amount, petitioner agreed to additional tax of $216.22, but disagreed with the remaining taxable capital attributed to the purchase of oxygen cylinders in the sum of $1,483,052.61, or additional tax of $121,282.35.

12. Petitioner paid the Division $7,737.50, representing additional tax on sales, expense purchases and agreed capital purchases, plus interest, leaving only the amount due on petitioner's purchases of the oxygen cylinders during the audit period in issue.

13. The Division issued to petitioner a Notice of Determination, dated October 5, 2009, which asserted additional tax due of $121,282.35 plus interest, for a total amount due of $154,996.22.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner argues that it provides several types of oxygen systems to its customers that include the oxygen cylinders in issue. Petitioner maintains that these oxygen systems, including the cylinders, were provided to customers pursuant to the terms of written, monthly agreements, which it contends underscored the form of the transaction as a rental. Petitioner noted that this transactional structure was mandated by Medicare regulations and that reimbursement from Medicare would not have been possible without so structuring its transactions.

In addition, petitioner notes that the monthly fee it charged to customers did not vary based on usage, and a separate fee was never charged for the oxygen contents or any service related to the oxygen cylinders, except in the uncommon circumstances where cylinders were actually sold to customers.

Since a rental of tangible personal property falls within the definition of a sale, as defined by regulation, petitioner believes that its purchase of the cylinders was for resale and exempt from tax.

15. The Division contends that petitioner was actually in the business of selling an oxygen service and that it only characterized its business as renting oxygen cylinders to qualify for reimbursement from Medicare, as required by regulation. Citing ***Matter of Atlas Linen Supply Co., Inc. v. Chu*** (149 AD2d 824, 540 NYS2d 347 [1989]), ***Matter of Upstate Farms Coops.*** (Tax Appeals Tribunal, May 2, 2002) and ***Matter of Genessee Brewing Co., Inc.*** (Tax Appeals Tribunal, May 9, 2002), the Division concludes that petitioner's primary business was providing

an oxygen service to its customers and that its provision of oxygen cylinders was merely incidental to that service. Therefore, its purchase of the cylinders was not for resale and not exempt from taxation.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the "receipts from every retail sale of tangible personal property, except as otherwise provided in this article." The cylinders purchased by petitioner from its suppliers clearly constitute "tangible personal property," defined in Tax Law § 1101(b)(6) as "[c]orporeal personal property of any nature." These retail sales are taxable unless they qualify for an exemption.

B. A "retail sale" is defined by statute pursuant to Tax Law § 1101(b)(4)(i)(A) as 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 . . . ." It is not apparent and has not been argued that the cylinders in issue became "physical component parts of tangible personal property." Rather, the cylinders were utilized by petitioner in its provision of oxygen services to its customers. The issue is whether petitioner purchased the cylinders from its suppliers for "resale as such."

C. Tax Law § 1101(b)(5) provides the following definition of "sale, selling or purchase," which encompasses the rental of tangible personal property:

> Any transfer of title or possession or both, exchange or barter, *rental*, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor. (Emphasis added.)

D. The Division's regulation at 20 NYCRR 526.7(c) characterizes a rental or a lease as follows:

> The terms rental, lease and license to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale" or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement.

Petitioner did not submit a copy of the monthly agreement it entered into with each of its customers, a copy of a monthly invoice or an affidavit of one with personal knowledge of the transactions. The only competent evidence supporting petitioner's allegation of a rental in the record was the provision in the Stipulation that stated that petitioner was reimbursed for the *rental* of oxygen cylinders under Medicare, Medicaid, private insurance or a private pay arrangement.

As prescribed by federal regulations, reimbursement for oxygen equipment was made on a rental basis only. Fee schedule payments for stationary oxygen system rentals, issued annually, were all-inclusive and represented a monthly allowance per beneficiary and included payment for the equipment, oxygen contents and accessories furnished during the rental period (CMS [Centers for Medicare & Medicaid Services, Department of Health and Human Services] Manual System, Pub. 100-04, Medicare Claims Processing Manual, Chapter 20, § 20.1, § 30.6.).

E. Consistent with the Claims Manual provisions and the regulations, the parties stipulated that petitioner did not separately charge for oxygen (oxygen contents) or any service related to the oxygen cylinders. But the parties also stipulated that petitioner billed and was reimbursed for its *rental* of the oxygen cylinders, which is construed in light of petitioner's concession that it *charged* its customer a fixed, monthly fee dictated by Medicare regulations that included the cylinder rental as well as all other components of the oxygen service. Clearly, it is

the same fee schedule payment, adjusted according to prescribed oxygen volume, that Medicare reimburses to petitioner.

As mentioned above, petitioner's customers who seek oxygen for medical reasons, must present a properly completed Certificate of Medical Necessity - Oxygen. On the certificate, the physician must provide the results of the most recent blood gas or oxygen saturation test, the date of the test, additional ancillary medical information and the oxygen flow rate ordered for the patient. In addition, the form provides the supplies and accessories required for the patient, the list prices and allowable reimbursements. The form, in which the physician attests to the truth of the statements made therein and subjects himself to possible civil and criminal penalties for false or omitted material, underscores the patient's primary medical need for oxygen and provides the supplier, in this matter, petitioner, with the authority to fill the prescription. The certificate's focus is the patient's need for oxygen and the rate at which it must be supplied.

Therefore, it is concluded that the patient is seeking, and petitioner is providing, a complete oxygen service paid for with one carefully regulated fee. Petitioner is delivering oxygen to its customers pursuant to a physician's prescription and also providing all other equipment, accessories and maintenance to accomplish said delivery.

F. Another indication that the oxygen, not the equipment or accessories, was of primary importance and the focus of the complete service provided was that the oxygen flow rate prescribed by the physician, not the value or temporary possession of the oxygen cylinders, determined the monthly fee allowed by the Medicare regulations.

The monthly fee, which did not change during the monthly billing period, was set based upon the prescribed number of liters of oxygen per minute required by individual patients. The monthly fee paid to petitioner was the national limited monthly payment rate as promulgated in

the Medicare regulations (42 CFR 414.226[c]). If oxygen was required at a flow rate above 4 liters per minute, the fee schedule amount was increased by 50 percent; if less than 1 liter per minute was prescribed, the fee schedule amount was decreased by 50 percent (42 CFR 414.226[e]). Although the monthly fee did not change during the billing period, the fee was subject to modification based on the oxygen flow rate prior to billing. By providing for the adjustment of the national limited monthly payment rate based on the prescribed oxygen flow rate per minute, Medicare indicated that providing oxygen was the controlling factor in, and focus of, the transaction. The value of the cylinder rental is not mentioned and Medicare's protocol for the provision of oxygen contents and equipment makes no provision for the assignment of specific values for individual components of the oxygen service.

Interestingly, even the Medicare Claims Processing Manual, Chapter 20, § 130.6, "Billing for Oxygen and Oxygen Equipment," begins with the statement: "The following instructions apply to all claims from providers and suppliers to whom payment may be made for oxygen," suggesting that the Centers for Medicare and Medicaid Services believed that oxygen was the primary focus of the transaction and the billing as well.

G. Petitioner did not submit copies of the monthly agreements or invoices into the record, preventing any analysis of the terms of the agreement or how oxygen contents and equipment were treated, if at all. The lone document that was submitted, entitled "Terms and Conditions of Rental," is without probative value since it bears no language identifying it as part of the monthly agreement, never identifies petitioner as a party to the agreement and never uses the words oxygen or cylinder. Further, the Stipulation does nothing to identify and explain it. In sum, the one-page document contains boilerplate language that could have been an addendum to any contract that needed to demonstrate compliance with Medicare regulations.

With so few facts in the record, and a sparsely worded stipulation, petitioner established only that it did not separately charge for equipment, oxygen contents, accessories or services related to the cylinders (required by Medicare regulation [42 CFR 414.226(c)]) and that it was reimbursed with one discrete fee schedule amount for the rental of the oxygen cylinders (42 CFR 414.226[d]) as one of several items provided as part of a stationary oxygen system.[2]

H. Petitioner argues that the "ultimate transactions" herein were equipment leases. It contends that the circumstances in ***Matter of Galileo International Partnership v. Tax Appeals Tribunal*** (31 AD3d 1072, 820 NYS2d 342 [2006]) were similar and found to be taxable leases even though the true object of the transaction was nontaxable access to a travel reservation system. However, in ***Galileo***, the leases were entered into evidence and analyzed by the court, which found that the agreements were structured as leases; that the customers were invoiced and tax was collected on the net amount charged under the lease; and the agreements repeatedly referred to the equipment as being leased. In addition, when the volume of the equipment increased, the monthly fixed charge increased as well.

In contrast, petitioner submitted no evidence to substantiate the terms of its monthly agreement or invoice. If there is one common element in the cases the parties have cited, it is that the courts have examined in detail the agreements that petitioners have claimed created rental or lease transactions (***see Matter of EchoStar Satellite Corp. v. Tax Appeals Tribunal***, 20 NY3d 286).

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[2] One historical note that is relevant to this discussion concerns the change in the law that provided that Medicare no longer paid for the purchase of oxygen equipment or accessories after June 1, 1989. Medicare then evolved to the system in effect during the audit period herein, providing an all-inclusive reimbursement for rentals of oxygen equipment, accessories, contents and service for a maximum of 36 months or the period of medical need.

Petitioner's failure to submit its monthly contracts and invoices prohibited any analysis of its transactions and thwarted its efforts to prove that the "ultimate transaction" was a rental of the equipment. In ***Matter of Albany Calcium Light Co. v State Tax Commission*** (44 NY2d 986, 408 NYS2d 333 [1978]), the Court of Appeals was faced with the issue of whether cylinders used to deliver gas to customers were purchased for resale. After acknowledging that the company had to recoup the cost of the cylinders in the rate charged for the gas, the Court refused to accept the contention that the cylinders were being rented to customers absent a specified charge for the rentals.[3]

Likewise, in ***Matter of Atlas Linen Supply Co., Inc. v Chu***, it was concluded that where contracts between Atlas and its customers contained no separate charge for linen rental and demonstrated that the provision of linens was "purely incidental" to the business of laundering, no separate rental transaction occurred. In so finding, the Court noted that "[a] petitioner's billing methods can provide substantial evidence to support a determination that a service and not a rental of property is involved." (***Id.*** at 349.)

Moreover, the regulations specifically provide that the agreement provisions are critical in determining whether a transaction was a rental (20 NYCRR 526.7[c]) yet petitioner failed to submit an agreement. Another requisite was that there be proof of a specified charge for the rental. Here, petitioner failed to submit any evidence of a separate charge, notwithstanding a passing mention in the Stipulation that its fees were set according to monthly invoices.

Although Medicare regulations require that an entire transaction for the provision of oxygen to patients pursuant to a certificate of medical necessity be in the form of a rental

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[3]There were demurrage charges for retaining cylinders for more than 30 days that the Court said were rental charges not included in the cost of the gas, but that such charges did not mean that the cylinders were purchased for the purpose of rental.

transaction, this does not suffice to prove that the cylinders in issue were purchased for "resale as such." Petitioner has not demonstrated that its compliance with Medicare regulations also satisfied the Tax Law's requirements for proving that the cylinders were rented to customers.

I. Finally, the parties were requested to address the Court of Appeals decision in ***Matter of EchoStar***, given its treatment of the rental equipment that was not the primary focus of the programming services furnished to customers. Having considered the arguments offered by both parties, it is found that the ***EchoStar*** decision confirms the conclusions reached in the discussion above.

EchoStar was a satellite television programming provider that purchased satellite television equipment and rented or leased it to its customers along with satellite television services. The taxpayer separately charged its customers for equipment and services. The Division of Taxation determined that petitioner's purchase of the equipment was taxable, despite petitioner's contention that the equipment qualified for the resale exclusion. The Court of Appeals, in reversing the Appellate Division, ruled that the taxpayer's purchase did qualify for the exclusion, noting that EchoStar's agreements with its customers controlled.

Following the rationale in ***Matter of Galileo***, the Court noted that all the factors considered there were present in EchoStar: the agreements were structured as leases; they distinguished the service component from the provision of equipment; they provided that the equipment rental fee was directly proportional to the number of receivers provided; and the agreements separately delineated equipment charges on monthly invoices. The Court of Appeals found that the presence of these factors satisfied the requirements for the resale exemption provided for in Tax Law § 1101(b)(4)(i)(A).

However, these factors were not present here. Petitioner submitted no agreements or invoices; did not establish a direct relationship between the charges and the equipment provided; and did not demonstrate that there was a separate charge for the cylinders. In addition, given the way that Medicare reimbursed for oxygen services, the actual value placed on cylinder rental would be impossible to discern.

Having determined that petitioner has not met its burden of demonstrating an entitlement to the resale exemption based on the reasons set forth above (***Matter of West Valley Nuclear Services Co., Inc. v. Tax Appeals Tribunal***, 264 AD2d 101, 706 NYS2d 259 [2000] ***lv denied*** 95 NY2d 760, 714 NYS2d 710 [2000]), it is not necessary to discuss whether the cylinders were merely incidental to the provision of oxygen services and whether such a determination would adversely affect a claim for a resale exemption.

J. The petition of Lincare, Inc. is denied and the Notice of Determination, dated October 26, 2009, is sustained.

DATED: Albany New York
May 30, 2013

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