STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LINCARE, INC.	:	DECISION 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 an exception to the determination of the Administrative Law Judge issued on May 30, 2013. Petitioner appeared by Ryan, Inc. (Mark Weiss, Esq., and Charles Rice, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on March 19, 2014 in New York, New York.

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

ISSUE

Whether petitioner's purchases of oxygen cylinders were made at retail and subject to sales tax, or for resale and excluded from tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 5, which we have modified. We also make additional findings of fact, numbered 14 and 15 herein. We make these changes to more accurately reflect the record. The Administrative Law

Judges's findings of fact, the modified finding of fact and the additional facts are set forth below.

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, or 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 systems, petitioner transacted only 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 did not change during the billing period. The fee was adjusted where the physician-prescribed oxygen flow rate was at a high or low volume. Specifically, if oxygen was required at a flow rate above four liters per minute, the fee schedule amount was increased by 50 percent; if less than one 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.

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

[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.

instances were rare and were the only situations 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 purchases 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 purchases 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.

14. The standard agreement between petitioner and its customers ("Terms and Conditions of Rental") contains the following provisions:

> 1. SUPPLIER [Petitioner] will maintain and service the rented equipment . . . if the customer gives SUPPLIER reasonable advance notice that the same is required.
>
> * * *
>
> 3. The monthly rental fee for all equipment rented hereunder will be set forth on the invoice mailed to you monthly. Payment is due upon receipt of the invoice.
>
> 4. This is a month-to-month rental. The Customer may terminate this rental by returning such Equipment or by giving notice from the physician, if prescribed, to SUPPLIER that the rental Equipment is no longer needed.
>
> * * *
>
> 6. SUPPLIER owns the Equipment. The Customer will not give or transfer possession of the Equipment to anyone else without prior written approval of the Area Manager.
>
> * * *
>
> 8. SUPPLIER may immediately repossess the Equipment upon the Customer's failure to pay the rental fees in accordance with Paragraph 3.

15. The record also contains a sample copy of a health insurance claim form by which petitioner requested payment from insurers. The health insurance claim form in the record seeks payment for two items of equipment described as a "concentrator" and a "gaseous portable add-on." The form indicates that the equipment is being rented and lists a single charge for each item. A copy of a page from the Medicare website (also in the record) describes a "gaseous portable add-on" as follows: "Portable gaseous oxygen system, rental; includes portable container [cylinder], regulator, flowmeter, humidifier, cannula or mask, and tubing." Petitioner is listed as the physician's supplier on the form.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioner failed to prove that it rented the cylinders to its customers. This conclusion was premised, in part, on the Administrative Law

Judge's finding that petitioner did not introduce a copy of the monthly agreement it entered into with each of its customers, or a copy of the monthly invoice or an affidavit of one with personal knowledge of the transactions.

The Administrative Law Judge acknowledged that the subject transactions were structured as equipment rentals in accordance with Medicare regulations. He also found, however, in accordance with the Medicare Claims Processing Manual, that petitioner's fixed monthly fee included payment for oxygen contents and accessories, as well as equipment. Considering the inclusion of oxygen contents in the transactions, the Administrative Law Judge determined that the equipment rental structure of the transactions in accordance with Medicare requirements was insufficient to prove that such cylinders were rented to customers and therefore purchased for resale.

The Administrative Law Judge determined that oxygen, and not equipment or accessories, was the focus of the transactions between petitioner and its customers. He premised this determination on the requirement that petitioner's customers provide a "Certificate of Medical Necessity – Oxygen," properly completed by a physician, in order to obtain an oxygen system from petitioner. He further noted that the monthly fee could be modified based upon the prescribed oxygen flow rate, another indication, according to the Administrative Law Judge, that oxygen was the focus of the transaction. He concluded that petitioner provided a complete oxygen service, whereby petitioner delivered oxygen to its customers pursuant to a physician's prescription and also provided all other equipment, accessories and maintenance to accomplish said delivery.

The Administrative Law Judge dismissed the "Terms and Conditions of Rental" document in the record as lacking in any probative value to establish rental of the subject cylinders. The

Administrative Law Judge reasoned that the document contains no language identifying it as part of the monthly agreement; does not identify petitioner as a party to the agreement; never uses the words oxygen or cylinder; and is not further explained in the stipulation. The Administrative Law Judge thus concluded that petitioner established only that it did not separately charge for equipment, oxygen contents, accessories or services related to the cylinders and that it was reimbursed with one fee for the rental of oxygen cylinders as one of several items provided as part of a stationary oxygen system.

The Administrative Law Judge found that a lack of detail regarding the terms of the monthly agreement between petitioner and its customers distinguished the instant matter from ***Matter of Galileo Intl. Partnership v Tax Appeals Trib. Of Dept. Of Taxation & Fin. of State of N.Y.*** (31 AD3d 1072 [2006]), ***lv denied*** 7 NY3d 715 [2006] and ***Matter of EchoStar Satellite Corp. v Tax Appeals Trib. of State of N.Y.*** (20 NY3d 286 [2012]). Both of those cases involved a transfer of equipment as part of a transaction that also involved the provision of a service. According to the Administrative Law Judge, in each of those cases, the finding of rental or lease transactions rested on a detailed review of the specific agreements themselves.

The Administrative Law Judge also cited cases (***Matter of Albany Calcium Light Co. v State Tax Commn***., 44 NY2d 986, 987 [1978], ***rearg denied*** 45 NY2d 839 [1978]; ***Matter of Atlas Linen Supply Co. v Chu***, 149 AD2d 824 [1989], ***lv denied*** 74 NY2d 616 [1989]) linking a finding of a rental of property to a specified charge for the rental. He thus determined that the absence of monthly contracts and invoices in the present matter precluded a finding that the cylinders were rented to petitioner's customers.

Having determined that petitioner did not prove that it rented the cylinders, the Administrative Law Judge did not address the question of whether the cylinders were incidental to the provision of oxygen services.

ARGUMENTS ON EXCEPTION

On exception, petitioner contends that, contrary to the Administrative Law Judge's conclusion, there is sufficient evidence in the record to establish that it did, in fact, rent oxygen cylinders to its customers. Specifically, petitioner notes that the "Terms and Conditions of Rental," the health insurance claim form, and the page from the Medicare website all support a finding that petitioner rented the cylinders to its customers. Petitioner also asserts that several findings of fact in the determination support its contention that the cylinders were rented to customers. Specifically, petitioner notes the Administrative Law Judge's findings that petitioner bills and is reimbursed under Medicare for the rental of oxygen cylinders; that Medicare requires petitioner to charge for equipment rental; and that the monthly fees charged to customers were recorded as rental fees in its books and records.

Petitioner further asserts that the transactions between it and its customers were not for services as the Administrative Law Judge concluded, but were, as required under Medicare, equipment leases. Accordingly, petitioner argues that its cylinder purchases fell within the resale exclusion from tax. Petitioner asserts that the decisions of the Appellate Division in ***Galileo Intl. Partnership*** and of the Court of Appeals in ***EchoStar Satellite Corp.*** support this conclusion.

Finally, petitioner asserts that the manner by which Medicare set monthly fees (***see*** Finding of Fact 5) reflects the customer's usage of the equipment and is therefore a reasonable way of calculating a rental fee for the equipment.

The Division asserts that the Administrative Law Judge correctly determined that petitioner failed to meet its burden of proof to show that it rented the cylinders to its customers and thus failed to show that it purchased the cylinders for resale. The Division also contends that petitioner's primary business was providing an oxygen system service and that its provision of cylinders to its customers was incidental to its provision of that service. The Division describes the service provided by petitioner as the delivery of full oxygen cylinders to the customer at home and the retrieval of empty or unused cylinders from the customer. The Division further asserts that the Administrative Law Judge's determination is consistent with ***Galileo Intl. Partnership*** and ***EchoStar Satellite Corp.***

OPINION

We reverse the determination of the Administrative Law Judge.

Tax Law § 1105 (a) imposes a sales tax upon "the receipts from every retail sale of tangible personal property, except as otherwise provided." There is no doubt that the cylinders at issue are tangible personal property (Tax Law § 1101 [b] [6]). Therefore, the issue in this matter concerns the definition of "retail sale" 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" (Tax Law § 1101 [b] [4] [i] [A]). The term "sale" includes a rental (Tax Law § 1101[b] [5]). The acquisition of an item for the purpose of rental is a purchase for resale for sales tax purposes (***Matter of Albany Calcium Light Co. v State Tax Commn.***, 44 NY2d 986, 987 [1978], ***rearg denied*** 45 NY2d 839 [1978]).

Petitioner's business was providing oxygen systems to customers for their in-home use (***see*** Finding of Fact 1). Such systems consisted of various oxygen equipment, including the

subject cylinders (***see*** Finding of Fact 2). The record thus establishes that petitioner purchased the cylinders for the purpose of providing them, filled with oxygen, to their customers as part of an oxygen system. If petitioner's provision of oxygen systems to its customers was a rental, as it asserts, then its purchases of cylinders were for resale as such and therefore not subject to sales tax.[2]

Receipts from purchases of tangible personal property are presumptively taxable (Tax Law § 1132 [c] [1]; 20 NYCRR 533.2 [a] [1]). Petitioner thus bears the burden of proving that its purchases of the cylinders were exclusively for resale and therefore nontaxable (***see Matter of Savemart, Inc. v State Tax Commn.***, 105 AD2d 1001 [1984], ***appeal dismissed*** 64 NY2d 1039 [1985], ***lv denied*** 65 NY2d 604 [1985]).

To determine whether the cylinder purchases qualify for the resale exclusion, we must first discern the primary purpose of petitioner's business, for any resale that is purely incidental to the primary purpose of a business is not a purchase for resale as such (***see Matter of Laux Adv. v Tully***, 67 AD2d 1066 [1979]). Here, as noted, petitioner's business was providing oxygen systems, consisting of equipment and the oxygen contents, to customers. Petitioner was, therefore, in the business of providing oxygen equipment, including cylinders, to its customers. Furthermore, while it is undisputed that a customer's medical need for oxygen was the catalyst for the subject transactions and the satisfaction of that need the ultimate goal of the transactions, such medical need could not be met without the equipment. The equipment that comprised the oxygen systems, including the subject cylinders, was an essential part of the transactions because it enabled the customers to administer the oxygen contents at the prescribed flow rate necessary

[2] We note that petitioner's retail transactions with its customers as described herein were exempt from tax pursuant to Tax Law § 1115 (a) (3) (***see also*** 20 NYCRR 528.4 [b] [3] [example 13] and [e]).

to meet their medical needs. We conclude, therefore, that petitioner's provision of oxygen equipment, including the subject cylinders, was part of petitioner's primary business and was not an incidental part of a provision of the oxygen contents.

We note our rejection of the Administrative Law Judge's conclusion, and the Division's contention on exception, that petitioner's true business was an oxygen system service. This conclusion focused on the customer's need for oxygen as the ultimate purpose for the transactions and petitioner's delivery and retrieval of cylinders as the basis for concluding that petitioner provided a service.

We disagree. The fact that a customer's need for oxygen equipment is predicated on a co-extensive need for oxygen contents is not a basis for concluding that the provision of such equipment, along with the provision of such contents, constitutes a service for sales tax purposes. Furthermore, we find that petitioner's delivery and retrieval of cylinders was incidental to its primary business of providing oxygen systems to its customers. We note that the incidental nature of delivery in the context of sales or rentals of tangible personal property is written into the Tax Law. Specifically, the definition of "receipt" in Tax Law § 1101 (b) (3) includes delivery charges by the vendor. Accordingly, the fact that, as in the instant matter, tangible personal property is delivered by a vendor to a purchaser does not transform such a sale of tangible personal property into a service. Petitioner's retrieval of cylinders is done in conjunction with delivery and is, therefore, also subordinate to petitioner's business. Additionally, although not discussed below, we note that petitioner's obligation to "maintain and service" the oxygen systems pursuant to the "Terms and Conditions of Rental" (***see*** Finding of Fact 14) is also incidental to petitioner's primary business. Finally, there is no indication in the

record that petitioner engaged in any other activity in connection with its oxygen systems, such as administering oxygen to customers, that was in any way colorable as a service. Accordingly, we find that, for sales tax purposes, petitioner's business did not involve the provision of a service.

The instant matter is distinguishable from ***Matter of Upstate Farm Coops., Inc***. (Tax Appeals Tribunal, May 2, 2002) and ***Matter of Genesee Brewing Co.*** (Tax Appeals Tribunal, May 9, 2002), both cited by the Division in support of its position that petitioner's primary business was the provision of an oxygen system service and that its provision of cylinders was incidental to that business. In ***Upstate Farms Coops., Inc.***, the issue was whether a milk distributor's purchases of milk crates used to deliver milk to supermarkets was for resale. We found that the distributor's purchase of such crates was not for resale in part because the distributor was in the business of selling milk and not milk crates. Similarly, in ***Genesee Brewing Co***., the issue was whether a beer brewer's purchase of wooden pallets used to deliver beer to customers was for resale. We found that such purchases were not for resale in part because petitioner was not in the business of selling pallets, but was in the business of selling beer.

The Division sees a commonality among the cited cases and the instant matter by the use of the items in question in each case as a means of delivery. Here, as the Division correctly notes, the cylinders were the means by which petitioner delivered oxygen contents to customers.[3] As discussed previously, however, the cylinders were also part of a system, that is, a combination of equipment, necessary for the successful administration of the oxygen contents. In contrast, the crates and pallets in ***Upstate Farms Coops., Inc.*** and ***Genesee Brewing Co.*** served no purpose

[3] By "delivery" here we mean the turning over of the cylinder to the customer. We do not refer to the administration of oxygen to the customer.

other than delivery of the product sold to the customer. We observe that the incidental nature of the transfer of the crates and pallets is reflected in the fact that, in each case, the charge for these items was merely a refundable deposit. Here, the entire transaction is structured as an equipment rental.

Albany Calcium Light Co. is similarly distinguishable from the instant matter. Although that case may, at first, appear factually similar to the present matter, a closer review reveals a significant distinction from the matter at hand. The petitioner in that case was in the business of selling industrial gases to commercial customers. The gases were contained in cylinders that were delivered to customers. The petitioner charged its customers for the gas and did not charge for the cylinders, except for occasional demurrage charges. The court noted that the petitioner's primary business was selling gas and found that such cylinders were not rented "absent a specified charge for that rental" (44 NY2d at 987). The court further noted that the occasional demurrage charges to customers were "purely incidental to its primary business of selling gas to its customers" (44 NY2d at 988). As with the crates in ***Upstate Farms Coops., Inc.*** and the pallets in ***Genesee Brewing Co.***, however, there is no indication that the cylinders in ***Albany Calcium Light Co.*** served any function other than as a means of delivery of the product sold. As discussed, in addition to serving as the means by which the oxygen contents are delivered to a customer's home, the cylinders in the present matter are part of a system of equipment necessary for the proper administration of such contents.

Having concluded that petitioner's business was the provision of oxygen systems to its customers, we turn directly now to the question of whether petitioner has shown that it rented the cylinders at issue to its customers as part of an oxygen system rental. As noted previously, the

Administrative Law Judge's determination rests, in part, on a finding that petitioner failed to substantiate its claim of rental because it did not introduce a copy of any monthly agreements or any monthly invoices. We disagree with the Administrative Law Judge on these points and have added Findings of Fact 14 and 15 herein as a result.

We added Finding of Fact 14 because we disagree with the Administrative Law Judge's conclusion that the "Terms and Conditions of Rental" document lacked any probative value. This document was attached to the stipulation of facts entered into by the parties and was described in the stipulation as follows: "Petitioner provides its customers with a written, month-to-month agreement that requires a customer to pay a monthly fee . . . . A copy of the 'Terms and Conditions of Rental' is attached . . . ." In our view, the parties thus stipulated that the "Terms and Conditions of Rental" document is the standard written agreement between petitioner and its customers (***see*** Finding of Fact 5). As there is nothing in the record to suggest that this stipulated fact should not be binding (***see*** 20 NYCRR 3000.11 [e]), the purported evidentiary defects in the document cited in the determination are inconsequential. We note that the terms of this document plainly indicate an equipment rental.

We added Finding of Fact 15 because we find the health insurance claim form to be a sample of similar forms used by petitioner in the course of its business during the period at issue. We also find that such forms functioned as invoices for third party payors. The claim form and explanatory page from the Medicare website were submitted by petitioner in accordance with the Administrative Law Judge's schedule for the submission of documents and briefs. Neither the Division nor the Administrative Law Judge raised any issue with respect to the relevance or credibility of either the claim form or the page from the Medicare website. The claim form and

the page from the Medicare website show that petitioner billed a single monthly fee for the rental of oxygen systems.

Considering (i) the "Terms and Conditions of Rental" document; (ii) the health insurance claim form and explanatory page from the Medicare website; (iii) the Medicare requirement that petitioner charge its customers for equipment rental and petitioner's compliance with that requirement (***see*** Finding of Fact 6); and (iv) petitioner's accounting for the monthly fees as rental revenue in its general ledger (***see*** Finding of Fact 9), we find that petitioner has proven that its transactions with its customers were structured and billed as equipment rentals. Further, we find that such facts strongly support a conclusion that petitioner rented the cylinders to its customers as claimed (***see EchoStar Satellite Corp.***; ***cf.***, ***Albany Calcium Light Co.*** [no rental absent a specified charge for that rental]).

Regarding Medicare's effective control over the equipment rental form of the transactions, we note that Medicare regulations and publications consistently refer to the rental of oxygen equipment (***see***, ***e.g.***, 42 CFR 414.226 and CMS [Centers for Medicare & Medicaid Services, Department of Health and Human Services] Manual System, Pub. 100-04, Medicare Claims Processing Manual, Chapter 20, § 30.6). We find it reasonable to conclude, absent evidence to the contrary, that Medicare chose to structure the transactions as equipment rentals because such form fairly reflects the substance of the transactions. In any event, this is clearly not a situation where a taxpayer structures a transaction in a form inconsistent with its substance in order to gain a sales tax advantage (***see***, ***e.g.***, ***Matter of Penfold v State Tax Commn.***, 114 AD2d 696 [1985]).

The Administrative Law Judge found that the lack of separately stated charges for oxygen equipment and oxygen contents in the subject transactions, a fact directly attributable to

Medicare's control over the form of the transactions, weighed significantly against petitioner's claim that the equipment was rented. We disagree and find that, under the instant circumstances, this failure to separately state a charge for equipment and contents does not preclude a finding that the equipment was rented.

The Administrative Law Judge, and the Division on exception, cite several cases in which courts determined that there was no rental of tangible personal property where receipts for sales of services were flat fees (***see Matter of U-Need-A-Roll Off Corp. v New York State Tax Commn.***, 67 NY2d 690 [1986] [a charge for a trash removal service included the provision of trash compactors and containers]; ***Matter of Atlas Linen Supply Co. v Chu***, 149 AD2d 824 [1989], ***lv denied*** 74 NY2d 616 [1989] [a charge for a laundering service included the provision of linens]). The Division also cites ***Albany Calcium Light Co.***, discussed previously, in support of this proposition.

The cited cases are distinguishable from the present matter and thus lend little support to the Division's position. In all three of these cases, the question presented was whether items provided as part of transactions were sold or rented even though there were no specific charges for those items. In other words, did the sale of gas in ***Albany Calcium Light Co.*** include the cylinder or did the sale of laundry services in ***Atlas Linen Supply Co.*** include the rental of linens? This is not the case in the present matter. Here, petitioner specifically charged for oxygen equipment rental. Indeed, based on the cited cases, the question in the present matter becomes does the rental of equipment include equipment? That question, of course, answers itself.

As discussed previously, oxygen equipment rental was part of petitioner's primary

business of providing oxygen systems to its customers. Furthermore, the provision of oxygen systems through a transaction structured and billed as equipment rental was "consistently part of its business model" (***Matter of EchoStar Satellite Corp. v Tax Appeals Trib.***, 20 NY2d at 292). We conclude, therefore, that the rental of equipment was not incidental to the provision of oxygen contents (***cf***., ***Matter of Laux Adv. v Tully***).

We also find that, although it includes an allowance for the cost of the oxygen contents, the monthly equipment rental fee reasonably reflects the rental value of the equipment. The Administrative Law Judge reviewed the manner by which the fee was set (***see*** Finding of Fact 5) and concluded that providing oxygen was the controlling factor in the subject transactions. We disagree. Although the fee was set by reference to oxygen flow rates, the record shows that actual oxygen use or consumption had a limited impact on the amount of the monthly fee. Specifically, the fee did not vary based on usage (***see*** Finding of Fact 6). Additionally, the fee was adjusted only for high and low flow rates. It did not vary for flow rates ranging from one to four liters per minute and thus did not correlate to oxygen consumption for this apparently wide range of flow rates. We conclude, therefore, that oxygen use or consumption was a limited factor in setting the amount of the monthly fee. Furthermore, under the facts herein, if oxygen was a limited factor in the fee, then, logically, the rental value of the equipment was necessarily a significant factor in the amount of the fee. We thus conclude that the monthly rental fee supports a finding that petitioner rented the subject equipment, and that such rental was a "significant part of the transaction" and not a "trivial element" of a sale of oxygen (***see Matter of Galileo Intl. Partnership v Tax Appeals Trib.***, 31 AD3d at 1075).

In support of its contention that the cylinders were not rented, the Division notes that

petitioner accounted for the cylinders as depreciable assets. We noted this as a factor weighing against a claim for a resale exclusion in ***Upstate Farm Coops., Inc.*** In that case, however, the petitioner claimed that it was actually selling the items in question to its customers. Hence, a failure to account for the items as inventory held for sale is properly construed as significant. Here, of course, petitioner retains ownership of the rented equipment. Accounting for such equipment as depreciable assets does not appear to us to be inconsistent with petitioner's claim that it held the equipment for rental.

We thus find that petitioner has established that the subject transactions were structured as equipment rentals, billed as equipment rentals, and that the monthly rental charge, in significant part, reflected the rental value of the equipment. Accordingly, petitioner has shown that it rented the subject cylinders to its customers as part of an oxygen system rental. Petitioner has thus met its burden to show that it purchased the cylinders for resale. As such, the purchases are excluded from tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lincare, Inc. is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Lincare, Inc. is granted; and

4. The notice of determination, dated October 5, 2009, is canceled.

DATED: Albany, New York
September 11, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner