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

TSB-A-92 (37) S
Sales Tax
April 30, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S920204A

On February 4, 1992, a Petition for Advisory Opinion was received from Queens MRI Associates, c/o QMRGP, Inc., Alan M. Winakor, 100 Herricks Road, Suite 206, Mineola, New York 11501.

The issue raised by Petitioner, Queens MRI Associates, is whether charges by Petitioner for use of a Magnetic Resonance Imaging (hereinafter "MRI") system are subject to sales and use taxes.

Petitioner leases medical equipment, specifically a MRI machine from the manufacturer through an equipment leasing company. Petitioner also leases space in a building and made all the necessary leasehold improvements to such space to create a suitable medical office to house the system.

Petitioner provides a professional corporation (hereinafter "PC") with management, marketing, and consulting services in order to properly operate an MRI facility. The facility operated by PC is for the purpose of performing MRI diagnostic scans on patients who have been referred thereto by health care professionals. By agreement, PC subleases a Picker-Vista 1.0 Telsa MRI System, along with other medical and administrative equipment to perform its service. In addition, PC subleases from Petitioner space in a building to use as a medical office.

In consideration for the subleasing of the MRI system and other equipment PC pays Petitioner a fixed annual rental of $300,000 and an additional $200 for each MRI study performed by the PC in excess of 1,000 in any year.

In consideration for the subleasing of the office space, PC pays Petitioner a fixed annual rental of $120,000 for the first three (3) years of the Agreement, $180,000 for the next three (3) years and $240,000 thereafter.

In consideration for the management and consulting services to be performed by Petitioner, PC pays to Petitioner a fixed fee for each MRI diagnostic procedure ("use fee"). The initial use fee will be $202 for each MRI diagnostic procedure performed by the PC. It is the intention of the parties that the use fee will be prospectively adjusted upward or downward from time to time to compensate for any significant changes in economic circumstances.

Section "7" of the contract between the parties provides that:

> The partnership and the PC are independent contracting parties and the relationship between them is that of an independent medical practice and an independent supplier of management and consulting services and Equipment. Nothing in this agreement shall be construed to create a principal-agent; employer-employee or master-servant relationship. Each party shall, at all times, be the sole employer of its personnel in the performance of its business; arrange directly with such

personnel for all salaries and other remuneration; and be solely responsible for the payment of all applicable federal, state or local withholding or similar taxes and provisions of Worker's Compensation and disability insurance.

Section "7" of the contract further provides that:

The PC shall have complete responsibility and supervision for its medical practice and its personnel. All medical records shall be the property of the PC. The PC shall employ all medical and technical personnel necessary for the conduct of its practice and shall bear the salary and related payments to be incurred in connection therewith, including, without limitation, (i) the payment of $100 per study reading fee, (ii) the payment of the salaries of the technicians operating the MRI System, as well as all fringe benefits payable in connection therewith, (iii) payment of the commercial rent tax due with respect of the sublease of the Premises by the PC, (iv) payment of the PC's normal legal and accounting charges and iv) any losses resulting from the uncollectibility of any of the PC's billings and charges. The PC however shall not be responsible for the payment of any expenses incurred for utilities. The partnership shall not interfere with the exercise by the PC of its professional and business judgment, nor shall the partnership interfere with, control, direct or supervise the PC or any individual whom the PC may employ or contract with in connection with the provision of its professional services.

Maintenance of the MRI system is the responsibility of Petitioner not the PC. If the MRI system malfunctions Petitioner will hire someone to repair it. Petitioner has the sole discretion whether or not to return the MRI system to the lessor at the end of the lease term or to exercise the purchase option.

The sales tax on the MRI system is paid by Petitioner to the equipment leasing company based on the leasing agreement between Petitioner and the equipment leasing company. Although sales tax is paid on the lease payments to the equipment leasing company, no sales tax is charged on the lease agreement between Petitioner and the PC.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. The term "retail sale" is defined, in part, in Section 1101(b)(4) of the Tax Law, as:

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

In order to qualify for the resale exclusion in the Tax Law, tangible personal property must be purchased exclusively for resale (Matter of Micheli Contracting Corp. v. State Tax Commission, 109 A.D.2d 95). The term "sale and purchase" includes rentals (Tax Law section 1101[b][5]).

In the Matter of Greene & Kellogg, Inc. v. Chu, 134 AD2d 755, 521 NYS2d 571, the court held that medical equipment and supplies purchased by a medical service and supply firm to be provided to hospitals as part of the firm's respiratory therapy services were not separate sales and rentals to the hospital since the firm provided technicians and therapists to operate equipment and, hence, making the equipment and supplies an integral part of the services the firm provided. Therefore, firm's initial purchases of equipment and supplies were not purchased "for resale," and were subject to sales tax. (emphasis added)

In Sigma Sound Studios, Adv Op Comm T&F, October 1, 1987, TSB-A-87(39)S the Commissioner advised that Petitioner's purchases of studio and sound processing equipment used by producers for artists' recording sessions and subsequent sound mixing and editing of magnetic tapes were purchased "for resale" since although one of Petitioner's employees was usually present at recording sessions, equipment was mainly operated by employees or sound engineers engaged by the producer. Thus, since Petitioner's client had the right to direct the use of the equipment, Petitioner was deemed to be renting tangible personal property to its customers rather than providing a service or producing tangible personal property. (emphasis added)

In the instant case the MRI system is operated mainly by employees of PC who directs the use of the equipment. The technicians who operate the equipment are not employees of the Petitioner.

Accordingly, pursuant to Sections 1101(b)(4), 1101(b)(5) and 1105(a) of the Tax Law, Greene & Kellogg, Inc. v. Chu, supra, and Sigma Sound Studios, supra, Petitioner is deemed to have leased the MRI system from the manufacturer for resale since Petitioner releases the MRI system to PC and Petitioner's employees merely provide management, marketing and administrative services to PC rather than providing employees to operate the systems as part of its services to PC. Therefore, Petitioner must collect sales tax on its charges to PC for use of the MRI system.

It is noted that since the lease of the MRI system by Petitioner to PC is subject to sales tax, the lease of said equipment by Petitioner from the manufacturer through the equipment leasing company is considered a sale for resale and is not subject to the imposition of sales tax in accordance with the meaning and intent of Section 1105(a) of the Tax Law.

It is further noted that the sublease of office space by Petitioner to PC is not a sale of tangible personal property and therefore is not subject to the sales tax imposed by Section 1105(a) of the Tax Law.

DATED: April 30, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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