

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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GREENE & KELLOGG, INC.	:	DECISION
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods Ended November 30,	:	
1978 through August 31, 1982.	:	

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Petitioner, Greene & Kellogg, Inc., 290 Creekside Drive, Tonawanda, New York 14150, 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 periods ended November 30, 1978 through August 31, 1982 (File No. 43281).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 12, 1985 at 1:15 P.M., with all briefs received by July 22, 1985. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq. and Mark S. Klein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner's purchases of supplies and equipment are taxable as purchases at retail for use in performing medical or similar services for compensation or are exempt as sales for resale.

FINDINGS OF FACT

1. On December 14, 1982, the Audit Division issued to petitioner, Greene & Kellogg, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended November 30, 1978 through November 30, 1981

asserting tax due of \$47,306.21, together with interest accrued to the date of the notice. Petitioner had executed consents authorizing determination of the tax prior to the date of the notice.

2. On December 14, 1982, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended February 28, 1982 through August 31, 1982 asserting tax due of \$10,389.20, together with interest accrued to the date of the notice.

3. Petitioner timely protested both notices of determination dated December 14, 1982.

4. Of the \$57,695.41 in total tax asserted due in the two notices of determination, the petitioner, prior to the hearing, agreed to \$12,263.18 of said amount leaving in issue for determination at the hearing \$45,432.23 in tax exclusive of interest.

5. Petitioner is generally engaged in: the manufacture of and the sale and rental of medical equipment; the sale of medical supplies; and the provision of respiratory therapy services.

6. The taxes at issue (see Finding of Fact "4") concern supplies and equipment used by petitioner in performing respiratory therapy services pursuant to its contracts with various hospitals.

7. There is asserted \$25,996.79 in tax due in respect of supplies and \$19,435.44 in tax due in respect of equipment.

8. The audit in respect of supplies was performed using petitioner's monthly journal entries by quarter for each hospital. An estimate was made for the period (September, 1978 through December, 1978) for which such totals were not available using the next four consecutive months. The figures were adjusted to eliminate "equipment repair labor" charged to the "hospital supplies"

account. Examination of daily charge sheets for "hospital supplies" indicated that a significant portion of the "supplies" billed by petitioner represented oxygen which the auditor determined to be a non-taxable charge. A test of daily charge sheets for St. Luke's Hospital for the quarter ended August 31, 1981 was performed and revealed that 40.367 percent of the charges to the "hospital supplies" account for such period were for oxygen. Additional tax due on "hospital supplies" for the entire audit period was therefore reduced by such percentage.

9. The audit in respect of equipment was performed using petitioner's quarterly totals of equipment transferred to individual hospitals determined from fixed asset inventory sheets and monthly journal entries of equipment transfers.

10. The audit was performed using petitioner's books and records. The auditor did not visit any of the hospitals to view the operation of petitioner's provision of respiratory services.

11. With respect to the provision of respiratory therapy services, petitioner's contracts with the hospitals generally provided that petitioner agreed to "establish and operate the Inhalation Therapy Department in the HOSPITAL".

12. Petitioner's activities were the subject of a previous audit by the New York State Department of Taxation and Finance's Audit Division. As a result of said audit, petitioner amended its agreements with the various hospitals. Said agreements, as amended, provided:

"B. Provision of Equipment

2. The Hospital agrees to lease from the Company all equipment (other than that listed in paragraph 5 below) required by the Company to furnish therapy services hereunder and the Company shall maintain all such equipment in good operating condition. The amount and type of additional equipment to be leased from and maintained in good

operating condition by the Company shall be at the discretion of the Hospital's medical and administrative staff.

3. During the duration of this agreement, the Hospital will purchase from the Company all oxygen tent canopies, masks, catheters and other disposable respiratory therapy accessories required.

C. Fee

The HOSPITAL agrees to obtain its requirements for inhalation therapy only through the COMPANY, and agrees to pay to the COMPANY as compensation for the provision of such service as follows: [a percentage (40% in one contract, 50% in another, etc.)] of the gross charges for the above service, such fee to be allocated 20% for the leasing, repair and maintenance of equipment, 10% for the purchase of disposable supplies and 70% for the furnishing of services hereunder."

Said paragraph C, in general, further provided that such charges were the current rates for such charges or higher, and that such charges were not to be reduced by the hospital without the consent of petitioner. Said agreements likewise generally provided that:

- a) the services to be provided by petitioner's employees would be in compliance with the Hospital Code of the State of New York and the hospital's particular standards;
- b) petitioner bore all payroll costs, benefits, etc. with respect to its employees;
- c) petitioner's employees' professional conduct was subject to the hospital's approval; and
- d) petitioner was to maintain certain liability insurance coverage with respect to its activities.

13. Petitioner's invoices to the hospitals for its charges for providing therapy services to the hospitals bore the following notation:

"This invoice includes a 70% charge for Technician Service purchased by you, a 20% charge for equipment rented by you, and a 10% charge for disposable supplies sold to you during the current month."

14. In some hospitals, petitioner provided respiratory therapy service twenty-four hours a day, seven days a week (e.g. St. Luke's Memorial) and in others it provided said services part-time (e.g. St. Francis Hospital - services of a therapist provided by petitioner from 8:10 A.M. to 5:00 P.M.).

15. The allocation of petitioner's charges, 70 percent for technician services, 20 percent for equipment rental and 10 percent for supplies, was determined by petitioner based upon petitioner's "internal profit and loss statement".

16. The respiratory therapists provided by petitioner in performance of its various contracts provide respiratory therapy services for hospitals. Although the therapists are employees of petitioner, they are generally also subject to the work rules of the various hospitals. Likewise, the hospitals are generally consulted prior to the hiring by petitioner of prospective employees who will work for petitioner in that hospital.

17. Except in rare emergency situations, respiratory therapy services may only be performed by the respiratory therapist on the "written order" of a physician. Oral orders (i.e. emergencies) must be confirmed in writing within twenty-four hours. Petitioner's respiratory therapists thus may not initiate, terminate or vary the manner or type of respiratory therapy to be provided any particular patient. However, while the respiratory therapy services provided by petitioner's therapists are in all instances pursuant to physicians' orders, the therapists themselves may function independently in their performance of such therapy. Thus, it is not necessary that the physician always be present during such therapy in conformity with particular hospital protocol as indicated by said physicians' orders. In other words, if a particular therapy were ordered twice daily, the therapist could not vary said order to provide the

therapy four times a day, yet the therapist might schedule and perform such ordered therapy without the direct supervision of the physician who ordered it to be performed. Petitioner's therapists are independent to the extent that nurses and other professionals function independently in a hospital, but they are likewise subject to direction and control in that all such therapy as is provided is pursuant to a doctor's orders closely regulated as to the manner, quantity and frequency of performance.

18. Petitioner's therapists occasionally provide training to the hospital's staff and they are also themselves occasionally provided training by the hospitals.

19. Petitioner's therapists blend in with the hospital staff and display no emblems or other indicia which would lead a patient to believe that they were other than staff of the hospital.

20. Employees of petitioner whose performance is deemed unsatisfactory or unprofessional by a hospital can be and actually have been dismissed by petitioner based upon such complaints.

21. Respiratory therapy equipment provided by petitioner in performance of its contracts with the hospitals is generally strategically located around the hospital and is generally equally accessible for use by both petitioner's employees (the respiratory therapists) and hospital staff. Some of the equipment may, however, be placed in areas such as the emergency room, operating rooms, recovery rooms and related areas, and intensive care units where petitioner's therapists are not permitted and such equipment is therefore accessible only to hospital staff.

22. Respiratory therapy supplies provided by petitioner in performance of its contracts with the hospitals are generally strategically located around the

hospital and are generally equally accessible for use by both petitioner's therapists and hospital staff. Some supplies may also be placed in areas off limits to petitioner's therapists and such supplies are therefore accessible only to hospital staff. All such stores of supplies are strictly inventoried and restocked by petitioner to maintain particular inventory levels.

23. Hospital patients upon whom petitioner's therapists have performed respiratory therapy services and upon whom supplies have been expended and equipment utilized are charged and billed for such services and uses by the hospital.

24. The hospitals are not billed for supplies by petitioner until they are consumed and used in performing therapy services upon a patient.

25. Petitioner bills the hospitals based upon the total of the therapy services and supplies provided to individual patients (determined from patient billings and individual and total patient charge sheets).

26. During the audit period, petitioner made sales of its various products to approximately 200 hospitals located in New York State. During the same period, petitioner provided respiratory therapy services for only about 20 hospitals in New York State. In addition to its contracts to provide respiratory therapy services for a particular hospital, petitioner may at the same time have other contracts with the same hospital regarding sales of petitioner's products other than its respiratory supplies and equipment.

27. It is petitioner's contention that the equipment and supplies are resold by it to the hospitals.

#### CONCLUSIONS OF LAW

A. That the sales and compensating use tax is imposed on purchases and uses of tangible personal property at retail.

B. That section 1115(a)(3) of the Tax Law exempts from the sales and use tax medical equipment (including component parts thereof) and supplies, but not including medical equipment (including component parts thereof) and supplies purchased at retail for use in performing medical and similar services for compensation.

C. That petitioner, pursuant to its contracts to perform respiratory therapy services in particular hospitals, is thereby engaged in the performing of "medical and similar services for compensation" as said term is used in section 1115(a)(3) of the Tax Law (see Parkmed Associates v. State Tax Commission, 491 N.Y.S.2d 467, \_\_\_ A.D.2d \_\_\_ [1985]).

D. That based upon petitioner's billing practices wherein petitioner receives a set percentage of the particular hospital's billing to the patient for the provision of respiratory therapy services, equipment and supplies, said amount allocated by petitioner 70 percent to services, 20 percent to equipment and 10 percent to supplies apparently regardless of (i) whether twenty-four hour coverage or less than twenty-four hour coverage is provided by petitioner's therapists, (ii) the quantity of equipment petitioner is providing to any particular hospital, and (iii) the quantity of supplies, it cannot be said under such circumstances that any of petitioner's supplies or equipment are actually resold as such to the hospital separate and apart from the provision of petitioner's services to said hospital. This is particularly so in view of the fact that there does not appear to be any separate accountability with the (one would expect) attendant reduction in payments where therapy is provided by other than petitioner's employees such that only supplies are "sold". Likewise, there is "rental" of equipment by petitioner to the hospital only when such equipment is used in performing a therapy service and such use is billed to a



patient; there appears to be no lease to the hospital when the equipment is not in use in such service and again there is no accounting in the fee allocation (service, supplies, equipment) regardless of whether service or supplies are provided to any particular patient.

E. That with respect to the provision of equipment and supplies, although there superficially appear to be elements of a rental of such equipment and sale of such supplies, said equipment and supplies are ultimately provided to the hospitals pursuant to petitioner's contracts to provide respiratory therapy services and are used by petitioner in its performance of said contracts and are therefore taxable (see Albany Calcium Light Co., Inc. v. State Tax Commission, 44 N.Y.2d 986 [1978]).


F. That, accordingly, except to the extent noted in Finding of Fact "4" with respect to previously agreed amounts, the notices of determination are sustained together with applicable interest as by law allowed and the petitions are denied.


DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER