

[J-100A-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

NORTHEASTERN PENNSYLVANIA	:	No. 93 MAP 2009
IMAGING CENTER,	:	
	:	Appeal from the Order of the
Appellee	:	Commonwealth Court at No. 635 FR 2007
	:	dated October 5, 2009 Overruling the
v.	:	Exceptions
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellant	:	SUBMITTED: December 1, 2010

* * * *

[J-100B-2010]

MEDICAL ASSOCIATES OF THE	:	No. 94 MAP 2009
LEHIGH VALLEY, P.C.,	:	
	:	Appeal from the Order of the
Appellee	:	Commonwealth Court at No. 50 FR 2006
	:	dated October 29, 2006 Overruling the
v.	:	Exceptions
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellant	:	SUBMITTED: December 1, 2010

OPINION

MR. JUSTICE EAKIN

DECIDED: December 21, 2011

In these consolidated appeals, the Commonwealth of Pennsylvania, Department of Revenue seeks review of the Commonwealth Court’s decisions holding appellees’

MRI¹ and PET/CT² Scan systems were not tangible personal property subject to sales tax under § 7202(a) of the Tax Reform Code of 1971, 72 P.S. § 7101 et seq., because they were part of real estate structures. We reverse.

The facts relevant to both appeals, as established by joint stipulation, are set forth individually below, along with the procedural history of each case.

Northeastern Pennsylvania Imaging Center v. Commonwealth of Pennsylvania

In December, 2003, Northeastern Pennsylvania Imaging Center purchased an MRI and PET/CT Scan system from Philips Medical Systems North America Company. Northeastern paid Philips \$2,172,375 for the MRI system, and paid \$129,774.02 in sales tax. For the PET/CT Scan system, it paid Philips \$1,815,000, and paid \$98,010 in sales tax. To prepare for installation of both systems in its facility, Northeastern made extensive structural changes to the building, which it owns. The changes included: revising the electrical, heating, ventilation, air conditioning, and plumbing systems; installing floor and ceiling supports; enlarging rooms; installing troughs in the walls and conduit above the ceilings to accommodate power cables and wire; installing radio frequency shielding in the walls, floor, and ceiling to prevent MRI radio signals from interfering with other devices; installing a vent for safe removal of cryogenic helium vapor the MRI magnet generated; installing lead panels for radiation shielding; enlarging

¹ MRI, or magnetic resonance imaging, is a type of diagnostic radiography used to make images of tissues and organs of the human body. Taber's Cyclopedic Medical Dictionary 1230 (19th ed. 2001).

² A PET/CT, or positron emission tomography/computerized tomography, system uses radioactive substances administered to the patient to image anatomic information from a cross-sectional plane of the human body. Stedman's Medical Dictionary 1842 (27th ed. 2000).

doors in order to move the PET/CT Scan system into the building; and removing an outside wall in order to move the MRI system into the building.

The MRI system weighed 15,201 pounds and could only be moved by a crane. It took approximately five days to install. The system's magnet and patient table were bolted to the building, using anchors installed in concrete beneath the floor. Removal of the system would require several days of interior construction work and would necessitate removing an exterior wall to give a crane access to the system. The PET/CT Scan system weighed 12,375 pounds and took approximately two weeks to install. The system's gantry³ and patient table were bolted to the building by anchors installed in concrete beneath the floor, and the system was hardwired to Northeastern's electrical system. Removal of the PET/CT Scan system would require several days. The MRI system remains in place in Northeastern's facility; however, the PET/CT Scan system became obsolete, and was removed and replaced with a new system in 2006. The new system was not at issue in this matter.

On July 20, 2004, the Department issued a letter ruling which stated, "[P]rospectively the sale and installation of an MRI to [a] taxable entity is considered a construction contract. The MRI is considered to be a permanent part of the real estate upon installation." Pennsylvania Sales and Use Tax Letter Ruling No. SUT-04-021, 7/20/04, at 1. Thus, the sale and installation of MRI and PET/CT Scan systems like the ones Northeastern purchased was no longer subject to sales tax, which only applies to the sale of tangible personal property and services. See 72 P.S. § 7202(a) (imposing six percent sales tax on sale at retail of tangible personal property or services). Instead,

³ The gantry is the large, cube-like machine with a circular opening in its center, in which the scanning occurs.

as part of a construction contract,⁴ the sale and installation of MRI and PET/CT Scan systems would be subject to a use⁵ tax under 72 P.S. § 7202(b), which imposes a six percent tax on the use of tangible personal property, paid by the seller or contractor. Ten months later, the Department rescinded its first letter ruling; it issued a second letter ruling which stated an installed MRI system would be subject to sales tax as tangible personal property. See Pennsylvania Sales and Use Tax Letter Ruling No. SUT-05-008, 5/20/05.

Northeastern had paid sales tax on its imaging systems in installments during a large portion of the period when the first letter ruling was in effect. It filed a claim with the Department December 7, 2006, seeking a refund of \$362,811.88 for the sales tax paid on the systems and their service agreements. The Department denied Northeastern's refund claim, and Northeastern filed a petition for review with the Board of Finance and Review, which affirmed.

Northeastern petitioned the Commonwealth Court for review, seeking reversal of the Board's decision on the grounds that the Department's first letter ruling was correct, and the acquisition of the imaging systems did not trigger a sales tax event; rather, the systems were installed as part of a construction contract and thus were subject to use

⁴ Section 7201 defines "construction contract" as "[a] written or oral contract or agreement for the construction, reconstruction, remodeling, renovation or repair of real estate or a real estate structure." 72 P.S. § 7201(nn). The Code does not define "real estate," and its definition of "real estate structure," see id., § 7201(qq), applies only to construction contracts with enumerated nonprofit organizations, which appellees are not.

⁵ Section 7201 defines "use" as including "[t]he obtaining by a construction contractor of tangible personal property or services provided to tangible personal property which will be used pursuant to a construction contract whether or not the tangible personal property or services are transferred." Id., § 7201(o)(17).

tax payable by the seller or contractor.⁶ The Department countered that Northeastern, not Philips (who sold the imaging systems), was responsible for the construction necessary to prepare the building for installation of the systems. It also argued the systems were items of tangible personal property, which were not so annexed to Northeastern's building that they became part of the realty.

In a published opinion, the Commonwealth Court reversed the Board's decision; it concluded the imaging systems, once installed, constituted realty, and thus were not subject to sales tax. Acknowledging that the Tax Reform Code's definition of "real estate structure" does not apply to for-profit corporations like Northeastern, the court relied on In re Appeal of Sheetz, 657 A.2d 1011 (Pa. Cmwlth. 1995), which the parties contended set forth the appropriate test for determining whether the imaging systems were tangible personal property or part of the realty. The court noted, in a footnote, that the parties agreed Commonwealth v. Beck Electric Construction, Inc., 403 A.2d 553 (Pa. 1979), did not apply; although the case concerned the applicability of sales tax, it was partially superseded by statute insofar as it pertained to sales and use tax for tax-exempt entities. See Northeastern Pennsylvania Imaging Center v. Commonwealth of Pennsylvania, 978 A.2d 1055, 1061-62 n.13 (Pa. Cmwlth. 2009). The court further noted Beck's analysis, which focused on an item's ease of portability in determining

⁶ Alternatively, Northeastern contended the Department's denial of its refund claim violated the Equal Protection Clause of the 14th Amendment to the United States Constitution and the Uniformity Clause of the Pennsylvania Constitution. Because the Commonwealth Court decided the case on the merits of Northeastern's claim that the imaging systems were not subject to sales tax, it did not reach the constitutional arguments.

whether it was realty, was based on a regulation that had since been superseded; thus, the court did not apply Beck. Id.

Instead, the court relied on Sheetz, which was a real estate assessment case. At issue in Sheetz was whether canopies covering gasoline pumps at a service station became part of the real estate for purposes of assessing the real property's value. Sheetz identified three classes of chattel: (1) furniture and similar items, which are always personalty; (2) items annexed to the building or land to the extent they could not be removed without causing injury to the realty or themselves, which are always realty; and (3) items affixed to the realty that can be removed without damaging the item or the realty, which items can be either realty or personalty, depending on the circumstances. Sheetz, at 1012-13. Because the gas pump canopies fell into the third category, the Commonwealth Court considered, in assessing the circumstances: (1) the manner by which the canopies were affixed to the land; (2) the canopies were essential to the property's use as a gas station; and (3) the canopies were intended to be permanent. Id., at 1013. Based on these factors, the Sheetz court concluded the canopies were realty and thus were to be included in the real estate assessment.

Applying the Sheetz analysis, the Commonwealth Court concluded the imaging systems fell within the third category, chattel which could be either realty or personalty, and proceeded to consider the three factors set forth in Sheetz. Regarding the first factor, i.e., the manner of physical attachment of the systems, the court concluded the systems possessed the requisite degree of attachment to the building, based on the extensive, complex level at which their components were wired, bolted, and connected to the building. Regarding the second factor, i.e., whether the systems were essential to the use of the building, the court held the owner's chosen use of the property determines whether the chattel is essential. The court concluded the systems were

essential to the ongoing use of the building as an imaging center, noting the “numerous and specialized structural, electrical, and mechanical improvements to [Northeastern’s building] would serve no function without the systems themselves.” Northeastern, at 1065. Finally, the court found the third factor — whether the systems were intended to be permanent — was met, as they were installed with the intention that they remain in the building as long as Northeastern continues to use it as an imaging center or until the systems become obsolete and must be replaced.

Accordingly, the Commonwealth Court held the systems were realty under the Sheetz test, and thus “real estate structures” within the meaning of § 7201(nn) of the Tax Reform Code. Therefore, the court concluded the systems were not subject to sales tax, and Northeastern was entitled to a refund; the court reversed the Board’s order.

Senior Judge McCloskey dissented, disagreeing with the majority’s conclusion that Northeastern intended the imaging systems to be a permanent part of the building. The dissent commented, “[T]he rapid advancement in medical technology fights against the majority’s conclusion. In fact, leasing of this type of equipment is becoming the norm because of the need to remain current with the technology.” Northeastern, at 1066-67 (McCloskey, S.J., dissenting).

Medical Associates of the Lehigh Valley, P.C. v. Commonwealth of Pennsylvania

In June, 2000, Medical Associates entered into an agreement to purchase an MRI system from GE Medical Systems for \$1,155,360; it subsequently assigned its rights under the agreement to First Union Commercial Credit Corporation, permitting First Union to take title to the system. In August, 2000, Medical Associates agreed to lease the system from First Union for 60 months, beginning December 31, 2000. The lease provided Medical Associates the option to purchase the system from First Union

at the end of 60 months, and it exercised that option in 2005, paying \$97,050.24. Medical Associates also purchased a CT Scan system from GE for \$675,018 in 2002. Medical Associates paid sales tax on both transactions, totaling \$100,976.40.

To prepare for installation of the imaging systems in its facility, Medical Associates made extensive structural changes to the building, which it leases. The changes included: revising the electrical, heating, ventilation, air conditioning, and plumbing systems; installing floor and ceiling supports; enlarging rooms; installing troughs in the walls and conduit above the ceilings to accommodate power cables and wire; installing radio frequency shielding in the walls, floor, and ceiling to prevent MRI radio signals from interfering with other devices; installing a vent for safe removal of cryogenic helium vapor the MRI magnet generated; installing lead panels for radiation shielding; and removing an outside wall in order to move the MRI system into the building.

The MRI system weighed 20,599 pounds and could only be moved by a crane. It took approximately three days to install. The system's magnet and patient table were bolted to the building, using anchors installed in concrete beneath the floor. Removal of the system would require several days of interior construction work and would necessitate removing an exterior wall to give a crane access to the system. The CT Scan system also took several days to install. The system's gantry and patient table were bolted to the building by anchors installed in concrete beneath the floor, and the system was hardwired to Medical Associates' electrical system. The CT Scan system was replaced in 2006 with an updated system. It took approximately one week to remove the old system; the floor had to be reconstructed prior to installing the new system, which is not currently at issue.

Medical Associates filed a claim with the Department July 7, 2005, seeking a refund of \$100,976.40 for the sales tax paid on the systems and their service agreements. The Department denied the refund claim, and Medical Associates filed a petition for review with the Board of Finance and Review, which affirmed.

Medical Associates petitioned the Commonwealth Court for review, seeking reversal of the Board's decision on the same grounds that Northeastern advanced, and raising similar arguments. In an unpublished decision, the Commonwealth Court reversed the Board, noting the issues raised were essentially identical to those in Northeastern. Accordingly, the court applied the Sheetz test and concluded, as in Northeastern, the imaging systems were "real estate structures" within the meaning of § 7201(nn) of the Tax Reform Code. Therefore, the court concluded the systems were not subject to sales tax, and Medical Associates was entitled to a refund of the sales tax it paid; the court reversed the Board's order. See Medical Associates of the Lehigh Valley, P.C. v. Commonwealth of Pennsylvania, No. 50 F.R. 2006, unpublished memorandum at 9-10 (Pa. Cmwlth. filed August 5, 2009). Senior Judge McCloskey dissented, expressing the same sentiments as in his dissent in Northeastern.

The Department has appealed both decisions. This Court has jurisdiction over the appeals pursuant to 42 Pa.C.S. § 723(b) ("Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section."). As noted, these appeals present the issue of whether the sale of MRI and PET/CT Scan systems and related service agreements constitutes a sale of "tangible personal property or services" on which sales tax is due. This is an issue of statutory interpretation of the Tax Reform Act's applicable provisions. Therefore, it is a pure question of law; our standard of

review is de novo, and our scope of review is plenary. Dechert LLP v. Commonwealth of Pennsylvania, 998 A.2d 575, 579 (Pa. 2010).

In interpreting a statute, our goal is to ascertain and effectuate the legislature's intent. 1 Pa.C.S. § 1921(a). The statute's plain language is the best indication of this intent. Dechert, at 579 (citation omitted). When the statute's words are clear and free from all ambiguity, its letter is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b). Tax statutes must be strictly construed against the Commonwealth, and any reasonable doubt regarding the application of the statute must be resolved in the taxpayer's favor. Id., § 1928(b)(3).

Section 7202(a) of the Tax Reform Code imposes a six percent tax on the "sale at retail" of "tangible personal property or services, ... which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth" 72 P.S. § 7202(a). "Sale at retail" includes "[a]ny transfer, for a consideration, of the ownership, custody or possession of tangible personal property[.]" Id., § 7201(k)(1). "Tangible personal property" is defined as "[c]orporeal personal property including, but not limited to, goods, wares, [and] merchandise" Id., § 7201(m).

Section 7202(b) of the Code imposes a six percent "use" tax on tangible personal property purchased at retail, payable to the Commonwealth "by the person who makes such use." Id., § 7202(b). "Use" includes "[t]he obtaining by a construction contractor of tangible personal property or services provided to tangible personal property which will be used pursuant to a construction contract whether or not the tangible personal property or services are transferred." Id., § 7201(o)(17). As noted in n.4, supra, a "construction contract" is "[a] written or oral contract or agreement for the construction, reconstruction, remodeling, renovation or repair of real estate or a real estate structure."

Id., § 7201(nn). The Code’s definition of “real estate structure” does not apply to appellees. See id., § 7201(qq); n.4, supra.

Thus, the Code’s plain language imposes a sales tax on the purchaser when tangible personal property is sold, and imposes a use tax on the contractor when tangible personal property is used as or becomes part of real estate or a real estate structure. The parties do not assert the Code’s language in this regard is ambiguous; rather, they acknowledge the Code does not set forth a test for determining whether tangible personal property has been converted to realty, and urge this Court to look to case law for guidance.

To effectuate § 7202(a), 61 Pa. Code § 31.11 defines “sales activities” as: “An activity resulting from an agreement or contract under which a contractor transfers tangible personal property or performs services upon tangible personal property belonging to another person and installs the property so as not to become a permanent part of the real estate.” Id. (emphasis added). Section 31.11 also defines what items are “construction activities,” which are subject to use tax under 72 P.S. § 7202(b): “An activity resulting from an agreement or contract under which a contractor attaches or affixes tangible personal property to real estate so as to become a permanent part thereof.” 61 Pa. Code § 31.11 (emphasis added). The question therefore is simple — were these machines installed or attached so as to become a permanent part of the real estate?

Both parties, as well as the Commonwealth Court, agreed the test in Sheetz was applicable; the only question was what the result of Sheetz’s application should be. See Northeastern, at 1062. The parties also agreed, before the Commonwealth Court, that Beck’s test did not apply; thus, the court did not discuss it. See Northeastern, at 1061-62 n.13. However, we are not bound by the parties’ position that Sheetz controls, or by

their agreement that Beck does not.⁷ It is our role to review all precedent arguably pertaining to the issue before us. If, in our review, we reach the conclusion that a more appropriate test exists than that applied by the court below, we would be remiss in not clarifying such test. Our review of both Sheetz and Beck leads us to conclude, for the following reasons, that Beck's test applies.

Sheetz was a decision involving neither sales tax nor use tax. The question there was whether an extension of the building's roof, artfully described as a canopy, was part of the real estate, so as to be considered when assessing the property for real estate tax purposes. In contrast, the case before us concerns a determination, under a specific and quite different statute, of whether the sale of this equipment is subject to sales tax paid by the purchaser, or use tax paid by the seller.

In the instant case, the Commonwealth Court understandably looked to Sheetz, not Beck, for guidance. Sheetz may have considered Beck, but it did not supplant Beck, and the principles in Beck are more suited to the inquiry before us. When dealing with sales versus use tax, we should apply precedent that applies to sales or use tax, not tests dealing with real estate tax. Concepts that are relevant to one tax may not be entirely applicable to another — the statutes having different wording and different purposes.

⁷ Although the parties conceded in the Commonwealth Court that Beck did not apply, they mention the case in their briefs. The Department acknowledges it did not advocate application of Beck before the Commonwealth Court, but concedes its approach has advantage in ease of application. Nonetheless, the Department argues, the equipment at issue here is personal property under either Sheetz or Beck, contending Sheetz's test is in harmony with Beck's. See Appellant's Brief, No. 93 MAP 2009, at 13 n.7; No. 94 MAP 2009, at 13 n.6. Appellees counter that Beck is distinguishable and does not control; however, even if it did, the equipment at issue is not portable and easily removable so as to be taxable as personal property. See Appellee's Brief, No. 93 MAP 2009, at 11-12 n.7; No. 94 MAP 2009, at 13-14 n.8.

The concepts of Sheetz seek to determine if a tax is due — the concepts of Beck deal with which tax is due. The concepts of affixing to real estate are common, but they are not identical, and the result of treating them as identical goes beyond the obvious. The Commonwealth Court’s decision finds use tax applies because \$4,000,000 worth of equipment has become a permanent part of these buildings — the state has its tax, which should end the matter. However, this decision means the real estate taxes on the premises are going to skyrocket. The assessor would be patently derelict if there is no reassessment of a building suddenly worth so much more than it was. In addition, if we were to apply Sheetz in the instant matter, any appeal regarding real estate tax assessment will be moot, the highest court in the land having used real estate tax precedent to resolve the issue as to this specific building and these machines.

We are better served by following the quite apposite precedent of our own Court, rather than abandoning it for an inapposite real estate tax case from our Commonwealth Court. We have no quarrel with Sheetz,⁸ but find no reason to apply it to a case that concerns a different tax law, particularly where there is Supreme Court authority directly on point.

The distinction between sales and use taxes was squarely dealt with by this Court in Beck. There, we considered whether an electrical construction contractor was a “user” of goods subject to use tax, or a “vendor” entitled to claim the “resale” tax

⁸ Sheetz’s third prong, the property owner’s intent as manifested by conduct, is at best a curious one, subject to variant results according to circumstances — is the same chattel to be subject to one tax in one case, and the other tax in the next case, based on perceptions of the owner’s intent? What is the point of making intent a prong at all? One thing we may presume with confidence is that if any party has intent vis a vis the tax laws, it will always be to avoid tax. This makes the premise of this prong very dubious.

exclusion of the Tax Act of 1963. Beck purchased electrical machinery and equipment from its suppliers, then sold the equipment to the Commonwealth's General Services Administration (GSA) and installed it in several public facilities pursuant to construction contracts with the GSA.

The Commonwealth Court concluded use tax was properly imposed under the Department of Revenue's Regulation 150⁹ on the sale and installation of certain items (transformers, rectifier, and switchgear), which were an integral part of the building's electrical system. However, the court concluded use tax was improperly imposed on other items (sound and master clock systems), which although installed pursuant to a construction contract, were not intended to become a permanent part of the real estate. Both parties appealed.

This Court, applying Regulation 150, affirmed the exclusion of the sound and master clock systems from use tax assessment, and reversed the imposition of use tax on Beck's sale and installation of the transformers, rectifier, and switchgear. We noted the parties stipulated this latter equipment could be relocated with no damage to it, and after relocation, it would retain its original form, character, and function. Beck, at 556. Thus, guided by Regulation 150's list of examples of property not subject to use tax, we focused on the items' "degree of portability, without injury to the character of the goods," id., and concluded "what matters under Regulation 150 is the ease with which the property is disassociated from the realty." id., at 557. Accordingly, we held the transformers, rectifier, and switchgear were not subject to use tax as they were not part of the real estate, and we reversed the portion of the Commonwealth Court order pertaining to them. id., at 558.

⁹ Regulation 150 spoke to when a construction contractor was a user of goods subject to use tax and when the contractor was a vendor entitled to claim the resale exclusion.

When Beck was decided, 72 P.S. § 3403-201(a) imposed a tax on retail sales in the Commonwealth. To determine whether an item was subject to sales tax or use tax, Beck focused on the Department of Revenue's Regulation 150, promulgated pursuant to § 580(a) of the Tax Act of 1963 for Education. 72 P.S. § 3403-580(a) (repealed 1971). Regulation 150's principles still exist, now authorized by § 7202(a), and embodied in 61 Pa. Code §§ 31.11-.16. See Bruce & Merrilees Electric Co. v. Commonwealth, 530 A.2d 994, 997 (Pa. Cmwlth. 1987).

Section 31.11 further states that absent proof to the contrary, certain items will be presumed not to become a permanent part of the real estate; the same section also provides examples of what will be presumed, absent proof to the contrary, to become a permanent part of the real estate. See 61 Pa. Code § 31.11. The examples listed are quite instructive. Specifically regarding medical equipment, only nurses' aid stations are listed as an item presumed to be so affixed as to become part of the property and thus be subject to use tax. Such stations are empirically distinct from equipment, different in terms of structural features, their function and placement, and their usage.

Beck looked to Regulation 150, now embodied in § 31.11, to determine whether an object was subject to sales or use tax, and so should we. Section 31.11's presumption that other items are not affixed to the real estate, and thus subject to sales tax, applies to many enumerated items found in a medical setting, including operating room lights, oxygen and gas systems, and, most tellingly, x-ray illuminators and equipment. Id. While these listings are not exhaustive, we can hardly ignore them. Clearly an MRI machine is more like x-ray equipment than a nurses' station. There is no factual reason in this record to ignore these logical presumptions and empirical guideposts.

Beck's focus on the character of the object, its ability to be installed and removed, its degree of portability, and whether it maintained its functional integrity after installation, seems the more appropriate query.¹⁰ Beck's inquiries address salient matters better than examining "manifestation of intent through conduct." Northeastern owns the building that houses its imaging equipment, see Partial Stipulation of Facts, No. 635 F.R. 2007, 6/12/08, at 4 ¶14, whereas Medical Associates leases the office space where its equipment is situated. See Partial Stipulation of Facts, No. 50 F.R. 2006, 6/12/08, at 6 ¶22. Under these facts, do Medical Association's intentions about permanence have any bearing, when it is merely leasing the premises? Does the fact that Northeastern owns the building in which it installed its equipment make a difference in ascertaining its intent? The Sheetz factors do not provide a solution. Again, Beck's inquiries are the proper ones for our purposes.

Even if Sheetz were the proper test, these machines were not acquired by the contractor for "use pursuant to a construction contract." They were the reason for renovation of the existing building, but they were not part of the building renovation. Use pursuant to a construction contract is a term referencing items of personalty that are really part of construction — things such as sinks, wiring, flooring, carpet and wallpaper, recessed lighting — things that are subject to sales tax for you and me at the hardware store, but subject to use tax if part of a construction contract. The state will have its tax, be it one or the other — why then are there two types of tax? It makes eminent sense to collect sales tax from you and me on piecemeal purchases, but can

¹⁰ We note the Commonwealth Court's observation that the imaging systems were not installed in the original construction of the buildings, were not permanent improvements remaining with the buildings on resale, and were not so affixed that their detachment from the buildings would damage them or the buildings. Northeastern, at 1063.

one parse out the sales tax on every nail used and add it to the bill given the ultimate owner? No, it is inefficient at best to charge sales tax at the end of a construction contract — there, tax is more easily rolled into the price of materials “used” in the construction contract.

The construction contract here did not use the big piece of medical equipment that would eventually be housed in the building. The construction in fact was just that — a means of housing the imaging equipment, not a means of becoming one with it. The real estate does not take the pictures. If a person builds a garage to house the family cars, the cars are not subject to use tax just because they necessitated the construction. The machines may have been bolted down to hold them steady — there is a need for precision in their usage — but so are washing machines in laundromats and pool tables in billiard halls, yet would one argue these are part of the real estate? The construction contract did not “use” these devices — it simply resulted in a place to put them. They were installed by their seller, who came and hooked them up once the construction was accomplished. That is not “usage” within the contemplation of the statutory definitions. The required element of use tax, usage in a construction contract, is just not here.

In the end, these machines are nothing more than cameras — they may be big, bulky, and complex, but they are just devices that take pictures, the evolution, if you will, of the x-ray machine. While their size makes them cumbersome, size does not make them part of the building. The machines are removable and replaceable — some of them, in fact, have already been removed and replaced. When technology passes these machines by, and surely it will, they will be taken out, the newer devices will come in, and the imaging will go on.

Application of the Beck test, the prevailing and appropriate authority of this Court, results in the same conclusion as does basic empirical application of the Code and its examples, and the language of the tax statute itself. Thus, we hold the equipment is subject to sales tax, and reverse the Commonwealth Court's decision.

Because of our holding that sales tax applies, Northeastern and Medical Associates' alternative argument that the denial of their refund claims violated the federal constitution's Equal Protection Clause and the state constitution's Uniformity Clause must be addressed. See n.6, supra. As the Commonwealth Court did not reach this issue below, remand to that court is required for disposition of the merits of this issue.

Order reversed; case remanded. Jurisdiction relinquished.

Mr. Chief Justice Castille, Madame Justice Todd, Mr. Justice McCaffery, and Madame Justice Orié Melvin join the opinion.

Mr. Justice Saylor files a dissenting opinion.

Mr. Justice Baer files a dissenting opinion.