
State of South Carolina
Department of Revenue
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SC PRIVATE REVENUE OPINION #02-5

SUBJECT: Medicines Sold by the South Carolina Department of Health and Environmental Control Central Pharmacy
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-36-2120(28) (2000 and Supp. 2001)
S. C. Code Ann. Section 12-36-110 (2000)
S. C. Code Ann. Section 12-36-120 (2000)
S. C. Code Ann. Section 12-36-950 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2001)
SC Revenue Procedural Bulletin #02-3

SCOPE: A Private Revenue Opinion is a written statement issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. A Private Revenue Opinion does not have the force and effect of law, and is not binding on the person who requested it or the public. It is, however, the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

PRIVATE REVENUE OPINIONS ARE GENERALLY EDITED FOR CONFIDENTIALITY. THE TAXPAYER HAS GRANTED THE DEPARTMENT PERMISSION TO PUBLISH THIS DOCUMENT UNEDITED.

Questions:

1. Are sales, as described in the Facts, by the South Carolina Department of Health and Environmental Control's ("DHEC") Central Pharmacy of medicines to persons with AIDS or HIV infection who have provided the pharmacy with a prescription from their private physicians exempt from the sales and use tax?
2. If the sales are exempt from the sales and use tax, must the South Carolina Department of Health and Environmental Control's ("DHEC") Central Pharmacy be licensed and file sales and use tax returns?

Conclusion:

1. Sales, as described in the Facts, by the South Carolina Department of Health and Environmental Control's ("DHEC") Central Pharmacy of medicines to persons with AIDS or HIV infection who have provided the pharmacy with a prescription from their private physicians are exempt from the sales and use tax.

Note: Since the DHEC Central Pharmacy is selling medicines to persons with AIDS or HIV infection who have provided the pharmacy with a prescription from their private physicians, such medicine may be purchased tax-free by DHEC from its supplier as a wholesale purchase under Code Section 12-36-120. When purchasing the medicines, DHEC may extend a resale certificate (Form ST 8A) in order to purchase the medicine tax-free from the supplier, provided such medicines will be resold by DHEC as described in the facts.

2. Even though its sales may be exempt from the tax under Code Section 12-36-2120(28), the South Carolina Department of Health and Environmental Control's ("DHEC") Central Pharmacy must be licensed and file sales and use tax returns to report such exempt sales as well as taxable sales (if any).

Note: While sales tax returns are filed monthly, Code Section 12-36-2580 allows a quarterly return and remittance, instead of a monthly return, when the tax due does not exceed one hundred dollars for any month and when the Department has authorized such quarterly returns. Code Section 12-36-2590 allows the Department to require returns and payment for other than monthly periods.

Facts:

The South Carolina Department of Health and Environmental Control's ("DHEC") operates a Central Pharmacy in Columbia, South Carolina and several other pharmacies within its county health departments located throughout the state. The pharmacies located in its county health departments issue medicines to patients who receive medical services from DHEC nurses and physicians located in these county offices.

Unlike the pharmacies located in the county health departments, the Central Pharmacy is only responsible for dispensing medicines pursuant to a prescription from a physician to treat person with AIDS or HIV infection. These persons are not DHEC patients and they must provide the pharmacist with a prescription from their physician.

This program, the South Carolina AIDS Drug Assistance Program (SC ADAP), was established under the Ryan White Care Act to provide drugs to treat HIV disease and/or prevent the serious deterioration of health arising from HIV disease in eligible individuals. In order to be eligible for the drug program, the individual must be a resident of South Carolina and have AIDS or the HIV infection.

The Central Pharmacy is responsible for ordering, purchasing, and dispensing the drugs to patients with AIDS or HIV infection. The Central Pharmacy purchases the drugs from an out-of-state vendor that is registered to collect the sales tax. As a requirement of the Central Pharmacy,

a physician must prescribe the drugs dispensed to the patient. The patient either mails the prescription or has their private physician fax or phone the prescription to the Central Pharmacy. Once the Central Pharmacy receives the prescription, the drugs are dispensed by a registered pharmacist and delivered to the patient's home by the U.S. Postal Service.

For those individuals who are required to pay for their medicines, the Central Pharmacy either bills the patient or the designated Ryan White Title II Consortia that provides assistance to the patient. Individuals with income at or below 300 percent of the federal poverty guidelines receive their medications free through Ryan White Care Act Title II funds. At no time are these individuals seen by anyone at the Central Pharmacy, and no medical services are provided by DHEC (with respect to AIDS or HIV drugs), other than the dispensing of medicines by the Central Pharmacy to the patients pursuant to a prescription. Ryan White Title II, III, or IV providers, private physicians, primary care facilities, and other clinics render medical services needed by these patients.

Discussion:

SC Regulation 117-304 concerns sales by state agencies and states in part:

Sales of tangible personal property by the State, counties, municipalities and other political subdivisions of the State (e.g. schools, sheriff offices, municipal housing authorities, welfare agencies) are subject to the sales tax, unless such sales fall within the provisions of Regulation 117-304.1 (transfers by State agencies to other agencies, counties or municipalities at cost) or are otherwise exempt. (See Code Sections 12-36-2120 and 12-36-2130 for the exemptions.)

Code Section 12-36-2120(28)(a) exempts from the sales and use tax:

medicine and prosthetic devices sold by prescription, prescription medicines and therapeutic radiopharmaceuticals used in the treatment of cancer, lymphoma, leukemia, or related diseases, including prescription medicines used to relieve the effects of any such treatment, and free samples of prescription medicine distributed by its manufacturer and any use of these free samples;

Furthermore, Code Section 12-36-110 defines "retail sale," in part as:

(1)(i) sales of drugs, prosthetic devices, and other supplies to hospitals, infirmaries, sanitariums, nursing homes, and similar institutions, medical doctors, dentists, optometrists, and veterinarians, if furnished to their patients as a part of the service rendered. These institutions, companies, and professionals are deemed to be the users or consumers of the property;

SC Regulation 117-332 (previously SC Regulation 117-174.257), "Medicines, Prosthetic Devices and Hearing Aids," states in part:

Code Section 12-36-2120(28) exempts from the sales and use taxes:

(a) medicines and prosthetic devices sold by prescription, prescription medicines and therapeutic radiopharmaceuticals used in the treatment of cancer, lymphoma, leukemia, or related diseases, including prescription medicines used to relieve the effects of any such treatment, and free samples of prescription medicine distributed by its manufacturer and any use of these free samples;

* * * *

To assist in the administration of this exemption, the Department has adopted definitions for the terms “medicine” and “prosthetic devices” as follows:

“Medicine” - a substance or preparation used in treating disease.

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Code Section 12-36-950 states:

It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.

However, if the seller receives a resale certificate signed by the purchaser stating that the property is purchased for resale, the liability for the sales tax shifts from the seller to the purchaser.

The resale certificate must include the purchaser’s name, address, retail sales tax license number, and any other provisions or information considered necessary by the department.

The department may require the seller to provide information it considers necessary for the administration of this section.

Based on the above statutes, it is the Department of Revenue’s opinion that, with respect to medicine, the application of the exemption found in Code Section 12-36-2120(28) is as follows:

medicine sold by prescription. In order for this exemption to be applicable, the medicine must be of a type that requires a prescription, the sale must require a prescription, and must actually be sold by prescription. As such, sales of medicine to a hospital, nursing home, or a similar institution or doctor are not exempt since such sales do not require a prescription.

prescription medicines and radiopharmaceuticals used in the treatment of cancer, lymphoma, leukemia, or related diseases. In order for this exemption to be applicable, the medicine must be of a type that requires a prescription; however, the medicine does **not** need to be sold by prescription. As such, sales of these medicines (to be used for the above purposes) to a hospital, nursing home, or a similar institution or doctor are exempt.

prescription medicines used to relieve the effects of the treatment of cancer, lymphoma, leukemia, or related diseases. In order for this exemption to be applicable, the medicine must be of a type that requires a prescription; however, the medicine does **not** need to be sold by prescription. As such, sales of these medicines (to be used for the above purposes) to a hospital, nursing home or doctor are exempt.

free samples of prescription medicine distributed by its manufacturer and any use of these free samples. In order for this exemption to be applicable, the medicine must be of a type that requires a prescription.

Based on the above, since DHEC is not providing professional medical services (with respect to AIDS or HIV drugs) to persons with AIDS or HIV infection, sales by DHEC's Central Pharmacy of medicines to persons with AIDS or HIV infection who have provided the pharmacy with a prescription from their private physicians are exempt from the sales and use tax provided the medicine is of a type that requires a prescription under the law. Such medicines may be purchased tax-free as a wholesale purchase by DHEC from its out-of-state supplier and may be resold by DHEC tax exempt as stated above.

The Central Pharmacy must be licensed and may purchase the medicine tax-free as a wholesale purchase from its out-of-state supplier under Code Section 12-36-120. When purchasing the medicines, DHEC may extend a resale certificate (Form ST 8A) in order to purchase the medicine tax-free from its out-of-state supplier provided such medicines will be resold by the Central Pharmacy as described in the facts.

The Central Pharmacy must report the exempt sales of medicine along with taxable sales (if any) on its sales and use tax returns. (Note: While sales tax returns are filed monthly, Code Section 12-36-2580 allows a quarterly return and remittance, instead of a monthly return, when the tax due does not exceed one hundred dollars for any month, and it is authorized by the Department. Code Section 12-36-2590 allows the Department to require returns and payment for other than monthly periods.)

SOUTH CAROLINA DEPARTMENT OF REVENUE

S/Elizabeth Carpentier
Elizabeth Carpentier, Director

December 27, 2002
Columbia, South Carolina