

SC PRIVATE LETTER RULING #05-1

SUBJECT: Radioactive Implant Seeds
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-36-2120 (2000; Supp. 2003)
S. C. Code Ann. Section 12-36-110 (2000; Supp. 2003)
SC Regulation 117-332 (Supp. 2003)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2003)
SC Revenue Procedure #03-1

SCOPE: A Private Letter Ruling 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 Letter Ruling is an advisory opinion; it 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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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.

Question:

Are sales of radioactive implant seeds by LHJ, Inc. to hospitals, medical centers and medical practitioners for use in the treatment of prostate cancer (as described in the facts) exempt from the South Carolina sales and use tax under Code Section 12-36-2120(28)(a)?

Conclusion:

Sales of radioactive implant seeds by LHJ, Inc. to hospitals, medical centers and medical practitioners for use in the treatment of prostate cancer (as described in the facts) are sales of therapeutic radiopharmaceuticals and are exempt from the South Carolina sales and use tax under Code Section 12-36-2120(28)(a) since they are being used in the treatment of cancer.

Note: Since the sale of radioactive implant seeds by LHJ, Inc. to hospitals, medical centers and medical practitioners for use in the treatment of prostate cancer (as described in the facts) are exempt, the associated procedure fee charged for each "radioactive seed implant procedure" performed by the hospital, medical center or medical practitioner is also exempt from the tax.

Facts:

LHJ, Inc. (“LHJ”) charges a hospital, medical center, and medical practitioner for the purchase of the radioactive seeds used in a “radioactive seed implant procedure” (also known as “brachytherapy”). LHJ also charges the hospital, medical center, and medical practitioner a procedure fee for each such procedure that the institution or person performs

The radioactive seed implant procedure is used in the treatment of prostate cancer. It is a technique of implanting radioactive source seeds directly into a cancerous tumor. This procedure allows the delivery of a highly concentrated, yet confined, dose of radiation directly to the prostate. The implanted radioactive seed is a rice-sized titanium capsule that contains a radioactive substance. Physicians typically implant from 40 to 100 seeds in the prostate gland. The seeds are injected directly into the prostate using thin, hollow needles inserted through the skin.

Once implanted, almost all of the radioactivity will be delivered by the third month. When the seeds are no longer radioactive, they will remain in the prostate permanently. There is no need to remove the seeds because the capsules are made of a material compatible with the body’s tissue.

Discussion:

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

medicine and prosthetic devices sold by prescription, prescription medicines used to prevent respiratory syncytial virus, 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; (Emphasis added.)

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:

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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.

"Prosthetic Device" - an artificial device to replace a missing part of the body.

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Based on the above statutes and regulation, it is the opinion of the Department, as stated in SC Revenue Ruling #03-2, that the application of the above exemption for medicines 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 used to prevent respiratory syncytial virus. 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 and therapeutic 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 (other than therapeutic radiopharmaceuticals); however, the medicine does not need to be sold by prescription. As such, sales of these medicines and therapeutic radiopharmaceuticals (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.

Therefore, sales of therapeutic radiopharmaceuticals to doctors, nursing homes, hospitals or similar institutions for use in the treatment of cancer, lymphoma, leukemia, or related diseases are retail sales exempt from the sales and use tax.

Finally, the Department's research indicates that therapeutic radiopharmaceuticals are radioisotopes that generate localized radiation in the required organ to destroy or weaken malfunctioning cells. In most cases, it is beta radiation that destroys the damaged cells and this is known as radiotherapy. Brachytherapy is short-range radiotherapy. See *Radioisotopes in Medicines, Nuclear Issues Briefing Paper 26* (May 2004) published by Uranium Information Centre Ltd of Melbourne, Australia (<http://www.uic.com.au/nip26.htm>).

Based on the above, it is the opinion of the Department that sales of radioactive implant seeds by LHJ, Inc. to hospitals, medical centers and medical practitioners for use in the treatment of prostate cancer (as described in the facts) are sales of therapeutic radiopharmaceuticals and are exempt from the South Carolina sales and use tax since they are being used in the treatment of cancer.

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SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank

Burnet R. Maybank III, Director

January 19, 2005
Columbia, South Carolina