
State of South Carolina
Department of Revenue
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SC PRIVATE LETTER RULING #03-3

SUBJECT: XYZ Ventilator System
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-36-910 (2000, Supp. 2001)
S. C. Code Ann. Section 12-36-1310 (2000, Supp. 2001)
S. C. Code Ann. Section 12-36-2120 (2000, Supp. 2001)
S. C. Code Ann. Section 12-36-110 (2000)
SC Regulation 117-308.8
SC Regulation 117-332

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2001)
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 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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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:

Is the sale by ABC USA, Inc. of the XYZ ventilator system, as described in the Facts, exempt from the sales and use tax as a "prosthetic device sold by prescription?"

Conclusion:

The sale by ABC USA, Inc. of the XYZ ventilator system, as described in the Facts, is not exempt from the sales and use tax as a "prosthetic device sold by prescription."

Note: The sale of the XYZ ventilator system may qualify for exemptions found in Code Section 12-36-2120(2) (sales to the federal government) and Code Section 12-36-2120(47) (sales to certain charitable hospitals exempt from property taxation that predominantly serve children and provide the care without charge to the patient). See these code sections for more details.

Facts:

ABC USA, Inc. ("ABC") is a manufacturer and service provider of highly sophisticated, state of the art medical equipment. ABC is one of the largest and most diversified suppliers of medical systems and solutions to the health care industry.

ABC manufactures the XYZ ventilator system which is used to treat a complete range of patient categories from neonate and pediatric to adult. The cost of a unit is generally between \$65,000 and \$70,000.

All XYZ ventilators are designed with one principle in mind: to deliver lung-protective ventilation, and to help wean the patient at the earliest opportunity. It provides enhanced modes and new tools for lung-protective treatment strategies. XYZ's design provides the patient with quality bedside ventilatory treatment throughout the entire chain of critical care within the hospital, including transport. The user interface adapts quickly to attach to different surfaces, such as a bed, shelf or wall. XYZ's compact battery unit further simplifies transportation of a patient.

The need to streamline operating costs and ensure easy training, operation and maintenance were key parameters in the design of XYZ. Its modular ventilator concept allows hospital asset managers to provide the specific system package required by a particular department. All three models can be upgraded by adding hardware and software modules to meet the hospital's future needs.

Discussion:

Code Section 12-36-910(A) imposes the sales tax and states:

A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail. (Emphasis added.)

Code Section 12-36-1310(A) imposes the use tax and reads:

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State. (Emphasis added.)

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 117-308.8 states:

Hospitals, infirmaries, sanitariums, nursing homes and like institutions are engaged primarily in the business of rendering services. They are not liable for the sales tax with respect to their gross proceeds or receipts from meals, bandages, dressings, drugs, x-ray photographs and other tangible personal property where such property is used in the rendering of the primary medical service to patients. This is true irrespective of whether or not such tangible items are billed separately to their patients. Hospitals, infirmaries, sanitariums, nursing homes and like institutions are deemed to be the users or consumers of such tangible personal property and the in-state sellers of these items are required to report and remit the tax due on the sale of such property to the hospitals, infirmaries, sanitariums, nursing homes, and like institutions or in the case of out-of-state purchases, use tax shall be reported and remitted by the purchaser.

* * * *

Where drugs, prosthetic devices and other supplies are furnished to their patients as a part of the medical service rendered, such hospitals, infirmaries, sanitariums, nursing homes and like institutions are deemed to be users or consumers of such drugs, prosthetic devices and other supplies.

Gases such as oxygen, etc., sold to hospitals, medical doctors, dentists, and others for professional use are subject to the sales or use tax, whichever may apply.

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

(a) 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;

* * * *

(e) dental prosthetic devices;

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

* * * *

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.

The sale of prescription lenses that replace a missing part of the eye are exempted from the tax, as for example eyeglasses prescribed for a person whose natural lenses have been surgically removed.

Eyeglasses, contact lens, hearing aids and orthopedic appliances, such as braces, wheelchairs and orthopedic custom-made shoes, do not come within the exemption at Code Section 12-36-2120(28). However, sales of hearing aids are exempt pursuant to Code Section 12-36-2120(38).

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In an unpublished decision by the South Carolina Court of Appeals, *Associated Medical Specialist, P.A. v. South Carolina Tax Commission and South Carolina Department Of Revenue*, SC Ct. of App., Unpublished Opinion No. 97-UP-447, the Court held that a professional association specializing in oncology and hematology was the user and consumer of chemotherapy drugs it administered to patients as part of its professional services. The Court, while acknowledging that these were prescription drugs, held that these drugs were not sold by prescription. Therefore, the sale of these drugs to the professional association did not qualify for the exemption for "medicine ... sold by prescription." See Code Section 12-36-2120(28). Note, the exemption for prescription medicines used in the treatment of cancer, lymphoma, leukemia, or related diseases or used to relieve the effects of any such treatment was subsequently enacted by the General Assembly in 1998 and became effective on June 28, 1999. (Act 362, Section 2, of 1998)

The terms "sale at retail" and "retail sale" found in Code Section 12-36-110(i) include 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." That section further states that "[t]hese institutions, companies, and professionals are deemed to be the users or consumers of the property."

The exemption does not exempt medicine. It only exempts "medicine ... 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 certain free samples or donated medicines.

Therefore, in order for the retail sale of medicine (other than those used to prevent respiratory syncytial virus or used in the treatment of cancer, lymphoma, leukemia, or related diseases, including prescription medicines used to relieve the effects of any such treatment) to be exempt, the retail sale must be one in which a prescription is used to purchase the medicine. In addition, the statute specifically exempts "prescription medicines used to prevent respiratory syncytial virus," and "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.” These provisions would have been unnecessary if the exemption for “medicine ... sold by prescription” exempted all prescription medicines purchased by doctors or hospitals for the benefit of a patient of the doctor or hospital. However, the exemption only applies to medicines when sold by prescription.

In addition, the Court noted that “[i]t is not unusual for a sales and use tax exemption to focus on a transaction to determine whether an item is exempt from taxation. A substantial number of sales tax and use exemptions focus on items sold by or to particular customers, or items used by a particular customer.” As such, the Court noted that the language of the statute does not exempt prescription medicines sold to a professional medical association since they were not “sold by prescription.”

Finally, SC Technical Advice Memorandum #88-23 states "it is unreasonable to interpret the intent of the legislature so as to exempt...medicines and drugs merely because such items are sold pursuant to a prescription. Therefore, ... medicines [to be exempt] must require a prescription."

The principles established in *Associated Medical*, also apply to prosthetic devices. The exemption does not exempt prosthetic devices. It only exempts “prosthetic devices sold by prescription.” Therefore, in order for the prosthetic devices to be exempt, the retail sale must be one in which a prescription is used to purchase the prosthetic device. In addition, the statute specifically exempts “dental prosthetic devices.” This provision would have been unnecessary if the exemption for “prosthetic devices sold by prescription” exempted dental prosthetic devices purchased by dentists from dental labs for the benefit of a particular patient of the dentist. However, the exemption only applies to prosthetic devices when sold by prescription.

Therefore, sales of prosthetic devices, other than dental prosthetic devices, to a hospital, nursing home, or a similar institution or doctor are not exempt since such sales do not require a prescription and are not sold by prescription.

Based on the above, it is the opinion of the Department that in order for the exemption for “prosthetic devices sold by prescription” to be applicable the sale must require a prescription and the device must actually be sold by prescription and the device must replace a missing part of the body. A device that merely replaces a missing function is not exempt. In addition, sales of prosthetic devices to a hospital, nursing home, or a similar institution or doctor are not exempt since such sales do not require a prescription.

Based on the above, the sale by ABC USA, Inc. of the XYZ ventilator system, as described in the Facts, is not exempt from the sales and use tax as a “prosthetic device sold by prescription.” In fact, a review of the information supplied indicates that the XYZ ventilator system is not a prosthetic device, but medical equipment used by a hospital in providing its professional medical care.

Note: Code Section 12-36-2120(2) exempts sales of “tangible personal property ... to the federal government. Commission Decision #93-2 held that sales paid for via Medicare or Medicaid are not sales to the federal government.

Code Section 12-36-2120(47) exempts sales of tangible personal property to charitable hospitals that are exempt from property taxation under Section 12-37-220; predominantly serve children; and where the care is provided without charge to the patient.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank

Burnet R. Maybank, Director

June 23, 2003
Columbia, South Carolina