



SC PRIVATE LETTER RULING #92-4

TO: ABC Medical, Inc.

TAX ANALYST: Steve Hallman

SUBJECT: Electrical Devices Sold by Prescription
(Sales and Use Tax)

REFERENCE: 42 U.S.C. Section 1395m
S.C. Code Ann. Section 12-36-910(A) (Supp. 1991)
S.C. Code Ann. Section 12-36-1310(A) (Supp. 1991)
S.C. Code Ann. Section 12-36-2120(28) (Supp. 1991)
Regulation 99-2
Regulation 117-174.257

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1991)
SC Revenue Procedure #87-3

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request.

Private Letter Rulings have no precedential value and are not intended for general distribution.

Question:

Are sales or leases of electrical devices known as TENS devices, prescribed by physicians for use as pain relievers, exempt from the sales and use tax pursuant to Code Section 12-36-2120(28)?

Facts:

ABC Medical, Inc. is engaged in the business of selling and leasing medical instruments. One of the principal products sold or leased by ABC Medical is an electrical device which can only be prescribed by a doctor for use as a pain reliever for certain patients.

This pain relieving device is known as a TENS device. TENS is an acronym for transcutaneous electrical nerve stimulator. Such a device transmits electrical pulses through the affected area of

a patient's body to reduce or relieve pain. The electrical charge transmitted by the TENS device results in the patient's body releasing biological chemicals which reduce pain. Typically, the device is prescribed for patients with arthritis, polio, chronic back pain or similar afflictions.

ABC Medical advertises that one of the benefits of the use of these electrical devices is "pain control without drugs". One of the brochures used by ABC Medical to promote the use of TENS devices states, in part:

...A battery-powered unit sends minute electrical impulses to the nerves through electrodes placed on or near the painful site. The result is a tingling sensation that reduces pain until it seems to vanish. While TENS is not considered a treatment for the actual cause of the pain, it has helped many thousands of people control their pain since the first models were introduced more than a decade ago...

Discussion:

Code Section 12-36-910(A) 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) 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 12-36-2120(28) exempts from the sales and use tax the sale or purchase of "medicine and prosthetic devices sold by prescription."

In summary, the sales and use taxes are imposed upon sales of tangible personal property at retail, but medicine and prosthetic devices sold by prescription are exempted from the tax.

Thus, it must be determined whether the electrical devices, TENS devices, sold or leased by ABC Medical are "medicine" or "prosthetic devices".

MEDICINE

Regulation 117-174.257 provides, in pertinent part:

...To assist in the administration of this exemption [Code Section 12-36-2120(28)], the Tax Commission has adopted definitions for the terms "medicine" ... as follows:

Medicine - Websters Third New International Dictionary of the English Language, Unabridged, Copyright 1966, defines the term "medicine" in part as "...a substance or preparation used in treating disease."...(Emphasis added)

The S.C. Board of Pharmacy regulates the practice of pharmacy, the operation of drugstores and pharmacies, the compounding, dispensing and sale of drugs, medicines, poisons, and physicians prescriptions. In providing further guidance as to what constitutes "medicine", Regulation 99-2, promulgated by this Board, states, in part:

..."Drug or Medicine" means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or the official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in man or other animals; and (3) articles (other than food) intended to affect the structure of any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in (1), (2), or (3); but does not include devices or their components, parts, or accessories....(Emphasis added)

PROSTHETIC DEVICES

Regulation 117-174.257 also defines the term "prosthetic device". This definition states, in part:

...Prosthetic Device - an artificial device to replace a missing part of the body Eyeglasses, contact lens, hearing aids and orthopedic appliances, such as braces, wheelchairs and orthopedic custom-made shoes, do not come within the exemption.(Emphasis added)

The TENS devices in question do not replace a missing part of the body.

Finally, in reviewing Code Section 12-36-2120(28) it must be remembered that, as a general rule, tax exemption statutes are strictly construed against the taxpayer. Owen Industrial Products, Inc. v. Sharpe, 274 S.C. 193, 262 S.E.2d 33 (1980); Hollingsworth on Wheels, Inc. v. Greenville County Treasurer et al, 276 S.C. 314, 278 S.E.2d 340 (1981). This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. York County Fair Association v. South Carolina Tax Commission, 249 S.C. 337, 154 S.E.2d 361 (1967).

Moreover, TENS devices are considered as durable medical equipment for Medicaid purposes. (See 42 U.S.C. Section 1395m)

Conclusion:

The TENS devices sold or leased by ABC Medical, Inc. are not exempt from the sales and use taxes, based upon the exemption at Code Section 12-36-2120(28).