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SC PRIVATE LETTER RULING #93-5

TO: LOP, Inc.

TAX MANAGER: John P. McCormack

SUBJECT: Medicine – Code Section 12-36-2120(28)
(Sales and Use Tax)

DATE: July 29, 1993

REFERENCES: S.C. Code Ann. Section 12-36-910 (Supp. 1992)
S.C. Code Ann. Section 12-36-1310 (Supp. 1992)
S.C. Code Ann. Section 12-36-2120 (Supp. 1992)
S.C. Code Ann. Section 12-36-110 (Supp. 1992)
S.C. Code Ann. Section 40-15-*280 (1976)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1992)
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.

Questions:

1. Is the sale by a licensed pharmacist of the prescription drug Lupron, pursuant to a prescription of a medical professional, exempt from the sales and use tax under Code Section 12-36-2120(28)?
2. Is the sale by LOP, Inc. to medical professionals of the prescription drug Lupron, for the purpose of administering the drug to a patient, exempt from the sales and use tax under Code Section 12-36-2120(28)?

Facts:

Lupron is an injectable prescription drug which is marketed in three different configurations. Two of the configurations are for the treatment of prostate cancer and the third is for the treatment of endometriosis.

The cancer treatments are sold in a two (2) or four (4) week kit (Lupron Subcutaneous) which is self-administered by the patients on a daily basis, and in a depot form (Lupron Depot 7.5 mg.) which is administered intramuscularly to the patient on a monthly basis by the doctor.

The Lupron treatment for endometriosis is marketed in a depot form (Lupron Depot 3.75 mg.) which is administered intramuscularly to the patient monthly by the doctor.

Due to the cost of the drug, it is generally ordered by the doctor for specific patients and is not held in inventory by the doctor.

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.

Code Section 12-36-1310(A) states:

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.

Code Section 12-36-2120(28) exempts from the sales and use tax the sale or purchase of “medicine...sold by prescription”.

In summary, the sales tax and the use tax apply to sales of tangible personal property at retail, but medicine sold by prescription is exempt from these taxes.

Regulation 117-174-257 defines “medicine” as “a substance or preparation used in treating disease”. Lupron is a drug used in the treatment of prostate cancer and in the treatment of endometriosis; and therefore, is a medicine within the exemption.

The question that must now be addressed is whether Lupron is sold by prescription. In order to qualify for the exemption from the sales and use tax, Lupron must be “sold by prescription”. In determining this, the transaction must clearly fall within the exemption.

“An exemption from the sales tax is never presumed but must be expressly and clearly conferred in plain terms...one who claims exemption from the sales tax must bring himself within the exemption provision and the letter of the statute...” 68 Am. Jur. 2d Sales and Use Taxes, Section 100.

Code Section 12-36-110 defines the terms “sale at retail” and “retail sale”, in part, to include:

- (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;

Therefore, sales of drugs to doctors for use in providing their services to a patient are retail sales. When a doctor administers a drug to a patient, the doctor is using that drug in providing professional services and is not selling the drug to the patient. The sale of the drug occurred when the doctor purchased the drug from the pharmaceutical company.

Furthermore, doctors do not purchase Lupron “by prescription” when it is purchased for use in providing their professional services.

It is an accepted practice in South Carolina to resort to the dictionary to determine the literal meaning of words used in statutes. For cases where this has been done, see Hay v. South Carolina Tax Commission, 273 SC 269, 255 S.E. 2d 837 (1979); Fennell v. South Carolina Tax Commission, 217 SC 484, 60 S.E. 2d 682 (1950).

The Second College Edition of the American Heritage Dictionary defines “prescription” in part as:

- A written instruction by a physician for the preparation and administration of a medicine.
... A formula directing the preparation of something.

A purchase order is not a prescription from a physician to LOP, Inc. Such an order does not constitute “a written instruction by a physician for the preparation and administration of a medicine”.

However, the sale by a licensed pharmacist of the prescription drug Lupron pursuant to a prescription of a medical professional does constitute the sale of medicine “by prescription”.

Finally, the question has arisen as to the application of the case of Dr. William J. Boykin v. South Carolina Tax Commission, Court of Common Pleas, Aiken County, Case No. 89-CP-02-590 to the purchase of Lupron by a physician for use in providing medical services.

In that case the court held that a “work authorization” issued by a dentist to a dental lab, instructing the lab how to make a dental prosthetic device, was a prescription. For the period in question (1085 – 1988), dental prosthetic devices were exempt from the tax if “sold by prescription”. However, prior to the issuance of the court’s finding on November 22, 1989, the law as amended (effective July 1, 1989) to exempt all “dental prosthetic devices”.

As a result of this law change and considering the economies of litigation, the court’s ruling was not appealed by the Commission.

While the Commission questions the court’s finding, it is also distinguishable from the facts and issues addressed in this ruling.

A “work authorization”, as defined in Code Section 40-15-280, is “a written order for dental technological work which has been issued by a licensed dentist.” It is required to contain, among other things, “a description of the work to be done, with diagrams, if necessary” and a “specification of the type and quality of materials to be used”. The dentist essentially instructs the dental lab how to construct the prosthetic device. This is a prescription for a prosthetic device, and not a purchase order, since it is a written instruction by a dentist for the preparation of the device that is custom made for a particular patient. Therefore, the case of Dr. William J. Boykin v. South Carolina Tax Commission, supra, is not applicable to the questions addressed in this document.

Conclusion:

1. The sale by a licensed pharmacist of the prescription drug Lupron, pursuant to a prescription of a medical professional, is exempt from the sales and use tax under Code Section 12-36-2120(28).
2. The sale by LOP, Inc. to medical professionals of the prescription drug Lupron, for the purpose of administering the drug to a patient, is not exempt from the sales and use tax under Code Section 12-36-2120(28), since it is not “sold [to the physician] by prescription”.