
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE RULING #96- 4 (TAX)

SUBJECT: Nuclear Pharmacies - Radioactive Isotopes
(Sales/Use Tax)

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

REFERENCES: S. C. Code Ann. Section 12-36-910(A) (1995 Supp.)
S. C. Code Ann. Section 12-36-1310(A) (1995 Supp.)
S. C. Code Ann. Section 12-36-110(1)(i) (1995 Supp.)
S. C. Code Ann. Section 12-36-2120(28)(a) 1995 Supp.)
S. C. Regulation #117-174.257
Technical Advice Memorandum #88-23

AUTHORITY: S. C. Code Ann. Section 12-4-320 (1995 Supp.)
SC Revenue Procedure #94-1

SCOPE: A Revenue Ruling is the Department of Revenue's official advisory opinion of how laws administered by the Department are to be applied to a specific issue or a specific set of facts, and is provided as guidance for all persons or a particular group. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Ruling or Revenue Procedure.

Question:

Are sales of radioactive isotopes by nuclear pharmacies to hospitals exempt from the sales and use taxes per S.C. Code Section 12-36-2120(28)(a)?

Conclusion:

Yes. Sales of radioactive isotopes by nuclear pharmacies to hospitals are exempt from the sales and use taxes per S.C. Code Section 12-36-2120(28)(a).

Facts:

Nuclear pharmacies are in the business of selling (dispensing) radioactive isotopes and other radioactive medicines to hospitals and doctors. This document deals with sales of radioactive isotopes to hospitals.

Hospitals are not allowed to purchase radioactive isotopes as part of their inventory. In order for a hospital to receive radioactive isotopes from a nuclear pharmacy, a doctor must write a prescription for a particular patient. That prescription is sent to the nuclear pharmacy where it is entered into a computer. The prescription label is printed which includes the pharmacy's name, the names of the doctor and the patient, a prescription number, the date and time, the name of the hospital, dosage, and other instructions. After the pharmacist prepares the isotopes, they are placed in a container, sealed and sent to the hospital. The isotopes are administered at the hospital by the doctor, or under the doctor's supervision. The hospital is then billed by the pharmacy and the hospital, in turn, bills the patient or the patient's insurance company. If, for some reason, the radioactive isotopes are not used by the hospital to treat the patient for whom the isotopes were prescribed, the isotopes must be returned to the nuclear pharmacy. The hospital cannot administer those isotopes to any other patient.

Nuclear pharmacists are licensed by the American Pharmaceutical Association and the South Carolina State Board of Pharmacy. They are regulated by the Nuclear Regulatory Commission, DHEC, OSHA, the U.S. Department of Transportation and the Federal Drug Administration.

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) provides:

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.

In summary, for a sale of tangible personal property to be subject to the sales or use tax, it must be a *retail sale*.

As for the meaning of the term "retail sale," Code Section 12-36-110 defines the term, in part, as:

(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 hospitals for use in providing their services to patients are retail sales.

Having established that sales of drugs or medicines to hospitals are retail sales subject to tax, we must next determine if any exemption is applicable.

Code Section 12-36-2120(28) provides an exemption from the sales and use taxes for the sale or purchase of "medicine ... sold by prescription."

The term "medicine" is defined in Regulation 117-174.257 as "a substance or preparation used in treating disease." Also, State Board of Pharmacy Regulation #99-2 defines the term "drug" or "medicine" as "[a]rticles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease...." Because radioactive isotopes are used in treating disease, they come within the definition of "medicine."

It must next be determined if the isotopes are "sold by prescription." And, if they are, it must be determined if they are *required* to be sold by prescription.¹

In determining whether sales of radioactive isotopes are by prescription, we must look to S.C. Pharmacy Regulation #99-2. That regulation defines the term "prescription" as:

(2) A written order, signed by the prescriber, which shall bear the name of the patient; name and quantity of the drug or device prescribed; directions for use; date of issue; and, either rubber stamped, typed, printed by hand, or typeset, the name, address, telephone number and degree classification of the prescriber, and, if a controlled substance is prescribed, the prescriber's Federal registration number.

The document given to nuclear pharmacies by hospitals to purchase radioactive isotopes contains the above-stated elements. Therefore, sales of radioactive isotopes by nuclear pharmacies to hospitals are made by prescription.

We next address whether radioactive isotopes are *required* to be sold to hospitals by prescription.

While the legislature has charged the Department of Revenue with authority and duty to administer and enforce the revenue laws of this State,² the Board of Pharmacy has responsibility for the enforcement of the pharmacy practice laws.³ And, as stated in Faile v. South Carolina Employment Security Com'n., 230 SE2d 219:

The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons. Poole v. Saxon Mills, 192 SC 339, 6 SE2d 761 (1939); City of Spartanburg v. Leonard, 180 SC 491, 186 SE2d 395 (1936); see also Davidson v. Eastern Fire and Casualty Company, 245 SC 472, 475, 141 SE2d 135, 136 (1965).

¹SC 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."

²S.C. Code Ann. Section 12-4-10 (1995 Supp.)

³S.C. Code Ann. Section 40-43-135 (1995 Supp.)

The State Board of Pharmacy has taken the administrative position that radioactive isotopes may only be sold to hospitals and doctors by prescription. As previously stated, unlike medicines and supply items purchased for general inventory, radioactive isotopes can only be purchased for a specific patient pursuant to a prescription and cannot be administered to any other patient.

In summary, radioactive isotopes are medicines which may only be sold by prescription and are, in fact, sold by prescription. Therefore, such sales come within the exemption.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/ Burnet R. Maybank III
Burnet R. Maybank, III, Director

Columbia, South Carolina
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