

Letter of Findings Number: 10-0115
Use Tax
For Tax Years 2006-08

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Use Tax—Medical Equipment and Supplies.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-18; IC § 6-2.5-5-19; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-27](#); [45 IAC 2.2-5-28](#); Sales Tax Information Bulletin 43 26 Ind. Reg. 1759 (January 2003).

Taxpayer protests the imposition of use tax on several items which it believes are exempt.

STATEMENT OF FACTS

Taxpayer is a nursing home in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on some purchases upon which sales tax was due. Therefore, the Department issued proposed assessments for use tax, ten percent negligence penalties, and interest for the tax years 2006-08. Taxpayer states that certain medical equipment and supplies were exempt from sales and use taxes. Taxpayer therefore protests the imposition of use tax on those items. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Medical Equipment and Supplies.

DISCUSSION

Taxpayer protests the imposition of use tax on certain purchases of medical equipment and supplies which it believes are exempt from sales and use taxes. The Department determined that Taxpayer had not paid sales tax at the time of purchase or rental/lease of the equipment and supplies during the tax years 2006, 2007, and 2008. The Department issued proposed assessments for use tax on these purchases. Taxpayer protests that some of the equipment and supplies were for specific residents of the nursing home and that all equipment and supplies were used as the result of a physician's prescription. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

Taxpayer protests that the tangible personal property in question qualifies for the exemption found at IC § 6-2.5-5-18, which provides:

- (a) Sales of durable medical equipment, mobility enhancing equipment, prosthetic devices, artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, contact lenses, and other medical supplies and devices are exempt from the state gross retail tax, if the sales are prescribed by a person licensed to issue the prescription.
- (b) Rentals of durable medical equipment, mobility enhancing equipment, and other medical supplies and devices are exempt from the state gross retail tax, if the rentals are prescribed by a person licensed to issue the prescription.
- (c) Sales of hearing aids are exempt from the state gross retail tax if the hearing aids are fitted or dispensed by a person licensed or registered for that purpose. In addition, sales of hearing aid parts, attachments, or

accessories are exempt from the state gross retail tax. For purposes of this subsection, a hearing aid is a device which is worn on the body and which is designed to aid, improve, or correct defective human hearing.

(d) Sales of colostomy bags, ileostomy bags, and the medical equipment, supplies, and devices used in conjunction with those bags are exempt from the state gross retail tax.

(e) Sales of equipment and devices used to administer insulin are exempt from the state gross retail tax.

(f) Sales of equipment and devices used to monitor blood glucose level, including blood glucose meters and measuring strips, lancets, and other similar diabetic supplies, are exempt from the state gross retail tax, regardless of whether the equipment and devices are prescribed.

(Emphasis added).

Also, IC § 6-2.5-5-19 provides:

(a) As used in this section, "legend drug" means a drug as defined in [IC 6-2.5-1-17](#) that is also a legend drug for purposes of [IC 16-18-2-199](#).

(b) As used in this section, "nonlegend drug" means a drug (as defined in [IC 6-2.5-1-17](#)) that is not a legend drug.

(c) Sales of legend drugs and sales of nonlegend drugs are exempt from the state gross retail tax if:

(1) a registered pharmacist makes the sale upon the prescription of a practitioner who is licensed to prescribe, dispense, and administer those drugs to human beings or animals in the course of his professional practice; or

(2) the licensed practitioner makes the sales.

(d) Sales of a nonlegend drug are exempt from the state gross retail tax, if:

(1) the nonlegend drug is dispensed upon an original prescription or a drug order (as defined in [IC 16-42-19-3](#)); and

(2) the ultimate user of the drug is a person confined to a hospital or health care facility.

(e) Sales of insulin, oxygen, blood, or blood plasma are exempt from the state gross retail tax, if the purchaser purchases the insulin, oxygen, blood, or plasma for medical purposes.

(f) Sales of drugs, insulin, oxygen, blood, and blood plasma are exempt from the state gross retail tax if:

(1) the purchaser is a practitioner licensed to prescribe, dispense, and administer drugs to human beings or animals; and

(2) the purchaser buys the items for:

(A) direct consumption in his practice; or

(B) resale to a patient that the practitioner is treating, in the case of sales of legend or nonlegend drugs.

The exemption is further defined by [45 IAC 2.2-5-27](#), which states:

(a) The term "person licensed to issue a prescription" shall include only those persons licensed or registered to fit and/or dispense such devices.

(b) Definition: The term "prescribed" shall mean the issuance by a person described in paragraph 1 of this regulation [subsection (a) of this section] of a certification in writing that the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser's body.

(Emphasis in original).

Also, [45 IAC 2.2-5-28](#) states:

(a) Sales of artificial limbs which are prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(b) The sale to the user of orthopedic devices prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(c) For purposes of the state gross retail tax orthopedic devices are designed to correct deformities and/or injuries to the human skeletal system including the spine, joints, bones, cartilages, ligaments and muscles.

(d) The sale to the user of dental prosthetic devices prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(e) For the purposes of the state gross retail tax, dental prosthetic devices are devices used for the replacement of missing teeth, as by bridges or artificial dentures.

(f) The sale to the user of eye glasses or contact lenses prescribed by one licensed to do so is exempted from sales tax. The exemption to the patient applies whether the item is sold by the practitioner or by a dispensing optician.

(g) The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax.

(h) The term "medical equipment, supplies or devices", as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body.

(Emphasis added).

Finally, the Department's application of this exemption is explained in Sales Tax Information Bulletin 43 26 Ind. Reg. 1759 (January 2003), which states:

I. Nursing Homes Not Required to Register as Indiana Retail Merchants

A nursing home located in Indiana is not required to register as an Indiana Retail Merchant and collect sales tax in regard to providing health care services to its resident patients for a fixed sum.

Meals, linens, or other tangible personal property normally furnished to the patient as a part of fixed fee charges to the patient are considered to be an incidental part of the service and as such are not subject to the collection of sales tax from the patient.

All purchases by the nursing homes of supplies, medicines, equipment furnishings, or other tangible personal property or taxable services to be used or consumed in the operation of the nursing home are subject to sales tax at the time of purchase by the nursing home. The purchase of grocery type food which is exempted by statute is not subject to sales tax.

Nursing homes as such, providing health care services for a fixed sum are not authorized to issue exemption certificates for any of its purchases.

Sales of nonlegend drugs as defined in [IC 16-18-2-101](#)(a) are exempt from the sales tax if the nonlegend drug is dispensed upon an original prescription or a drug order, and the user of the drug is a person confined to a nursing home.

II. Nursing Homes Required to Register as Indiana Retail Merchants

If the nursing home conducts the sale or leasing of tangible personal property to employees or persons other than their patients of the nursing home (such as the sale of meals to visitors and guests), or sells or leases property (such as medicine, clothing, supplies, television sets, etc.) to its patients which is separately billed or charged, the nursing home must register as an Indiana Retail Merchant and must collect and remit Indiana Sales Tax on such transactions.

Tangible personal property which is purchased by the nursing home for rental purposes as outlined in the preceding paragraph is not subject to sales tax at the time of purchase, and the nursing home registered as an Indiana Retail Merchant, may issue exemption certificates at such time for such purposes.

(Emphasis added).

Taxpayer believes that its purchase, lease, or rental of durable medical equipment and medical supplies qualifies for the exemption provided by IC § 6-2.5-5-18(b). In the course of the hearing process, Taxpayer provided documentation supporting its position that physicians licensed to issue prescriptions did prescribe the use of the durable medical equipment, mobility enhancing equipment, and other medical supplies and devices for Taxpayer's residents. Taxpayer believes that this establishes that its residents used the equipment and so were the "users" of the physician-prescribed equipment.

Taxpayer also states that the equipment at issue is specialized and requires specific training for its use. Taxpayer's residents could not use this equipment themselves, but required Taxpayer's employees to facilitate the use of the items. After the equipment was used for a specific resident, it was returned to the rental or leasing facility. Taxpayer states that these factors are further evidence of the use of the equipment by specific patients and therefore is further evidence of qualification for the exemption.

The Department does not agree with Taxpayer's conclusion. [45 IAC 2.2-5-27](#)(b) plainly states that, in order to qualify for the exemption, the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser's body. In this case, the purchaser/renter/lessee is Taxpayer. Taxpayer is a nursing home and has no body upon which medical equipment, supplies, or devices could be used. Rather, Taxpayer purchases, rents, or leases the equipment and uses it in its provision of services to its residents. The rental/leasing entity billed Taxpayer for the items. Taxpayer's residents were, in turn, billed by Taxpayer.

For the overwhelming majority of its residents, third-parties (such as government agencies) paid Taxpayer a flat rate per resident per day regardless of whether or not medical equipment or supplies were used in its care for a particular resident. As provided by Information Bulletin 43, the Department has already determined that all purchases by nursing homes of supplies, medicines, equipment furnishings, or other tangible personal property or taxable services to be used or consumed in the operation of the nursing home are subject to sales tax at the time of purchase by the nursing home. As previously stated, Taxpayer is the purchaser of the equipment and supplies at issue and therefore those purchases were subject to sales tax at the time of purchase by Taxpayer.

A second matter under protest is Taxpayer's protest that the Department's audit report included double entries for some purchases in the Department's statistical sample which was used in a projection calculation of Taxpayer's purchases. Taxpayer states that some of the invoices show sales tax was collected at the time of purchase and then the entire invoice amount was included as non-taxed. Taxpayer protests that this results in distortion of taxable purchases and uncollected sales tax. An example of such an invoice is found in Exhibit C-2 of Taxpayer's protest materials. The Department will conduct a review of the audit report and will remove any amounts for which such supporting documentation has been provided. The Department will then remove any verified entries which show sales tax previously collected and will recalculate the projection for use tax due.

In conclusion, Taxpayer is not eligible for the medical equipment exemption found at IC § 6-2.5-5-18(b). [45 IAC 2.2-5-27](#) requires that the purchaser of such equipment and supplies use those items on its own body. Taxpayer does not use those items on its body, but instead uses those items on the bodies of its residents. Such

use does not qualify for exemption. The Department will review the use tax projection calculations for entries which Taxpayer has provided documentation which shows that sales tax was previously collected. Any such entries will be removed and use tax due will be recalculated.

FINDING

Taxpayer's protest is denied in part and sustained in part, as discussed above.

Posted: 11/24/2010 by Legislative Services Agency

An [html](#) version of this document.