

Letter of Findings: 04-20120288
Sales and Use Tax
For the Years 2009 and 2010

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ISSUE

I. Sales Tax – Sale of Drugs and Medical Equipment – Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-4; IC § 6-2.5-1-17; IC § 6-2.5-5-18; IC § 6-2.5-5-19; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-2-1](#); [45 IAC 2.2-5-28](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Sales Tax Information Bulletin 48(A).

Taxpayer, a veterinary clinic, protests the imposition of sales tax on its sale of flea medications and Elizabethan collars.

STATEMENT OF FACTS

Taxpayer is an Indiana veterinary clinic. The Indiana Department of State Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2009 and 2010 and made an assessment of additional sales tax pursuant to the audit. The Department found that Taxpayer did not collect sales tax on its sales of the flea medications, Elizabethan collars, the rental of traps, and the rental of pet carriers.

According to the Department's audit, Taxpayer now agrees that it should collect sales tax on its rental of traps and pet carriers. However, Taxpayer protests the imposition of sales tax on its sale of flea medications (Advantage, Advantage Multi, and Frontline) and Elizabethan collars under prescription by its veterinarians who are licensed to dispense medications and equipment for treatment of animals.

I. Sales Tax – Sale of Drugs and Medical Equipment – Exemption.

DISCUSSION

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The person who acquires property in a retail transaction is liable for the tax on the transaction and, unless exempt, shall pay the tax to the retail merchant. The retail merchant shall collect the tax as agent for the state. IC § 6-2.5-2-1(b).

The notice of proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Therefore, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. When Taxpayer fails to collect and hold the taxes in trust for the state, Taxpayer is personally liable for the sales tax, interest, and penalties due to the state for those sales.

An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. IC § 6-2.5-5 et seq.

When a taxpayer claims it is entitled to a tax exemption, it bears the burden of proving that the terms of the exemption have been met. Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). The Department will strictly construe the exemption statutes against the taxpayer claiming the exemption. Id.

A. Sale of Flea Medications.

The Department's audit subjected Taxpayer's sale of flea medications (Advantage, Advantage Multi, and Frontline) to sales tax. The Department's audit stated that while these drugs are dispensed by veterinarians (suggesting that typically they would be exempt), the Department's audit also found that because these drugs are also sold over-the-counter ("OTC"), they are therefore not exempt even when sold by a licensed practitioner. The audit states:

Taxpayer sells Frontline, Advantage, and Advantix flea control medications. The taxpayer understands after discussing this issue with their supplier that these items are supposed to be sold only to licensed practitioners to dispense these medications. In reality, these items are being sold over the counter by large brick and motor stores and also on the internet. Since there is no exemption available for over the counter medications, this audit will propose an assessment of Indiana sales tax on the selling price of the items as per [45 IAC 2.2-2-1](#).

Taxpayer argues that under IC § 6-2.5-5-19(c)(2) the sale of the flea medications is exempt because they are sold by licensed practitioners and it does not matter whether the sale is of legend or non-legend drugs. IC § 6-2.5-5-19 states in relevant part:

(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.

(Emphasis added).

As a side note, Taxpayer points out that only one of the flea medications, Advantage, is sold over the counter. Whether or not the Department's audit or Taxpayer are correct as to which drugs are sold over the counter, the issue is irrelevant in this instance because the issue, pursuant to IC § 6-2.5-5-19(c), is whether or not these drugs are sold by licensed practitioners, irrespective of whether they are legend or non-legend drugs (the latter being the drugs that can be sold OTC).

IC § 6-2.5-5-19(c) addresses transactions where drugs – whether legend or non-legend – are sold by licensed practitioners ([IC 6-2.5-5-19\(c\)\(2\)](#)), or sold by registered pharmacists upon prescription by licensed practitioners ([IC 6-2.5-5-19\(c\)\(1\)](#)).

IC § 6-2.5-5-19(d) addresses transactions where a person (other than a licensed practitioner or a registered pharmacist) sells non-legend drugs. In that case, under IC § 6-2.5-5-19(d) the sale of the non-legend drug is only exempt if it is dispensed under an original prescription or a drug order and the ultimate user of the drug is confined to a hospital or health care facility.

First, there is no question that Taxpayer's veterinarians are licensed practitioners. [45 IAC 2.2-5-37\(a\)](#). Second, the flea medications are drugs under IC § 6-2.5-1-17. Taxpayer presented documentation demonstrating that these flea medications are sold to Taxpayer's patients by its veterinarians.

Furthermore, the Department's own Sales Tax Information Bulletin 48(A), 20100224 Ind. Reg. 045100099NRA (February 1, 2010) (and an earlier 1989 version), states under section II.A.:

A. Sales to Clients

The following sales and/or rental of medical equipment, devices, drugs, and other medical supplies are exempt from Indiana Sales or Use Tax provided such medical equipment, etc., is prescribed by a licensed practitioner:

- (1) Sales of drugs by a registered pharmacist or by a licensed practitioner
- (2) Sales of other durable medical equipment, vaccines, medical supplies, and/or devices, which are required to correct or alleviate injury to, malfunction of, or removal of a portion of a patient's body
- (3) Sales of repair and maintenance parts for the above durable medical equipment
- (4) Sales of insulin, oxygen, blood, or blood plasma if purchased for medical purposes
- (5) Sales of syringes or other instruments used to administer insulin

(Emphasis added).

Taxpayer has met its burden to show that the flea medications are properly sold to its patients exempt from sales tax under IC § 6-2.5-5-19(c).

B. Sale of Elizabethan Collars.

The Department, on page 8 of the Audit Summary, lists Elizabethan Collars among the items it is subjecting to sales tax under the general heading of "Non Medicine Sales." The Audit Summary, however, does further explain why it subjected these items to sales tax.

Taxpayer protests that these items are sold as medical equipment subject to exemption. Taxpayer explains that:

These collars are dispensed upon the order of a veterinarian post-surgery only when medically necessary. As stated in the Post Operative Care for Dogs handout given to clients of [Taxpayer]..., "Male dogs must wear the Elizabethan Collar for at least 10 days... Male dogs can do great damage to their incision in a short amount of time." Male dogs (and cats) are likely to lick, scratch and bite their incisions after surgery, causing numerous medical problems. The only way to successfully prevent their behavior is through the use of an E-collar.

IC § 6-2.5-5-18 addresses the sale of medical equipment, supplies, and devices. It states in relevant part:

(a) Sales or rentals 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 or rentals are prescribed by a person licensed to issue the prescription.

[45 IAC 2.2-5-28](#) states in relevant part:

(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).

The Information Bulletin 48(A) referenced above states exemption under section II(A)(2):

Sales of other durable medical equipment, vaccines, medical supplies, and/or devices, which are required to correct or alleviate injury to, malfunction of, or removal of a portion of a patient's body

The Department does not believe that Elizabethan Collars are properly thought of as "medical equipment" for purposes of exemption under IC § 6-2.5-5-18(a). [45 IAC 2.2-5-28](#). Because the Elizabethan Collars are not "directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body" but rather have a preventative function, under [45 IAC 2.2-5-28](#)(h) (and the referenced information bulletin) they are therefore not properly sold to Taxpayer's patients exempt from sales tax. Because Taxpayer should have collected sales tax on its sale of Elizabethan collars, the audit correctly assessed the tax.

FINDING

Taxpayer's protest that its sales of flea medications are exempt from sales tax is sustained.

Taxpayer's protest that its sales of Elizabethan collars are exempt from sales tax is respectfully denied.

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