

Letter of Findings: 04-20130058
Gross Retail Tax
For the Years 2009, 2010, and 2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUES

I. Gross Retail Tax – Exempt Medical Equipment and Supplies.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-18; IC § 6-2.5-5-18(a); IC § 6-2.5-5-18(b); IC § 6-8.1-3-3(a)(2); IC § 6-8.1-5-1(c); [45 IAC 2.2-5-27](#); [45 IAC 2.2-5-27\(a\)](#); [45 IAC 2.2-5-27\(b\)](#); [45 IAC 2.2-5-28](#); [45 IAC 2.2-5-28\(g\)-\(h\)](#); [45 IAC 2.2-5-36](#); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Nat'l Serv-All, Inc. v. Ind. Dep't of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994); Harlan Sprague Dawley, Inc. v. Ind. Dep't of State Revenue, 605 N.E.2d 1222 (Ind. Tax Ct. 1992); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Sales Tax Information Bulletin 48 (August 2008); Sales Tax Information Bulletin 48 (July 1984).

Taxpayer argues that its purchases of certain medical equipment and devices are exempt from gross retail tax because the items are durable medical equipment prescribed to its patients.

II. Gross Retail Tax – Drugs.

Authority: IC § 6-2.5-1-17; IC § 6-2.5-5-19; IC § 6-2.5-5-19(d); General Motors Corp. v. Indiana Dep't. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, (Ind. Ct. App. 1974); [45 IAC 2.2-5-35](#); [45 IAC 2.2-5-36](#).

Taxpayer maintains that its purchases of certain medical supplies are exempt from gross retail tax because the supplies are exempt "drugs" prescribed to its patients.

STATEMENT OF FACTS

Taxpayer is an Indiana for-profit healthcare facility. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records, invoices, purchase orders, and sales tax returns.

The Department found that Taxpayer owed additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted by phone during which Taxpayer's representative explained the basis for the protest. This Letter of Finding results.

I. Gross Retail Tax – Exempt Medical Equipment and Supplies.

DISCUSSION

The Department's audit concluded that Taxpayer owed additional sales/use tax. Taxpayer argues that certain of the transactions addressed during the audit were exempt from sales/use tax because the transactions represented the purchase of "Medical Equipment and Devices not subject to sales and use tax in Indiana"

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary 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. IC § 6-2.5-3-2.

Nonetheless, Indiana law provides certain specific exemptions from sales/use tax including an exemption found at IC § 6-2.5-5-18 which, provides.

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

The Department's regulation [45 IAC 2.2-5-28](#)(g)-(h) repeats the qualification necessary to qualify for the exemption:

(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.

However, [45 IAC 2.2-5-36](#) states as follows:

(a) The gross retail tax shall apply to the following purchase transactions made by licensed practitioners:

- (1) All office furniture, equipment and supplies.
- (2) Drugs of a type not requiring a prescription, when not purchased for resale.
- (3) Surgical instruments, equipment and supplies.
- (4) Bandages, splints, and all other medical supplies consumed in professional use.
- (5) X-Ray, diathermy, diagnostic equipment, or any other apparatus used in the practice of surgery or medicine.

(b) The purchase of items for resale by the physician or surgeon. In order to resell items the practitioner must be licensed as a retail merchant, and must quote the selling price of any items separately from the charge for professional service.

The statute and regulations specify that the purchase of medical equipment and supplies is exempt if the items are purchased to alleviate the "purchaser's" injury or medical condition.

As noted, under IC § 6-2.5-5-18(a) and [45 IAC 2.2-5-27](#), a person having a "condition brought about by injury to, malfunction of, or removal of a portion of the purchaser's body," may be eligible for a sales tax exemption if the "person" receives a proper prescription for the "medical equipment supplies and devices."

Under IC § 6-2.5-5-18(a) and [45 IAC 2.2-5-28](#), sales of prescribed "medical equipment, supplies, or devices" are exempt if they are necessary to "correct or alleviate injury to, malfunction of, or removal of a portion of the purchaser's body."

The Department's position on this issue is stated at Sales Tax Information Bulletin 48 (August 2008), 20080827 Ind. Reg. 045080661NRA.

The following sales and/or rental of durable medical equipment, devices, drugs, and other supplies are exempt from Indiana sales and use tax provided such durable medical equipment, devices, drugs, and other supplies are prescribed by a licensed practitioner:

- (1) Sales of artificial limbs;
- (2) Sales of orthopedic devices designed to correct deformities and/or injuries to the human skeletal system including the spine, joints, bones, cartilages, ligaments, and muscles;
- (3) Sales of dental prosthetic devices used for the replacement of missing teeth such as bridges and artificial dentures;
- (4) Sales of corrective eyeglasses and contact lenses;
- (5) Sales of drugs by a registered pharmacist or licensed practitioner;
- (6) Sales of durable medical equipment that can stand repeated use; is primarily used to serve a medical purpose; is generally not useful to a person in the absence of an illness or injury; is not worn in or on the body; and is directly required to correct or alleviate injury to, malfunction of, or removal of a portion of the human body; and
- (7) Sales of repair and replacement parts for the previously mentioned durable medical equipment.

...

Sales tax shall apply to the following purchases made by licensed practitioners.

- (1) All office furniture, equipment and supplies;
- (2) Drugs not requiring a prescription and used by the practitioner in the course of rendering services;
- (3) Surgical instruments, equipment, and supplies;
- (4) Bandages, splints, and all other medical supplies consumed in professional use; and
- (5) X-ray, diathermy, diagnostic equipment, or any other apparatus used in the practice of surgery or medicine. (See also Sales Tax Information Bulletin 48 (July 1984)).

Sales of durable medical equipment are exempt from the gross retail tax "if the sales are prescribed by a person licensed to issue a prescription." IC § 6-2.5-5-18(a). In Indiana, exemptions from tax are strictly construed against the taxpayer. *Harlan Sprague Dawley, Inc. v. Ind. Dep't of State Revenue*, 605 N.E.2d 1222, 1225 (Ind. Tax Ct. 1992). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101.

Additionally, the taxpayer bears the burden of showing that it falls within the terms of the exemption. Indiana

Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Nat'l Serv-All, Inc. v. Ind. Dep't of State Revenue, 644 N.E.2d 954, 955 (Ind. Tax Ct. 1994); see also IC § 6-8.1-5-1(c).

In reviewing Taxpayer's protest, it should be noted that the Department has been authorized to adopt administrative rules governing, among other things, "the interpretation of the statutes governing the listed taxes." IC § 6-8.1-3-3(a)(2). Pursuant to that authority, the Department has defined the verb "prescribed" as "the issuance by a person described in [45 IAC 2.2-5-27(a)] 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." 45 IAC 2.2-5-27(b) (Emphasis added). The plain language of this longstanding definition requires that the purchaser be the one whose body has been affected by a condition which requires the use of the medical equipment.

Taxpayer seeks an exemption for the purchase of numerous items of medical supplies and equipment. For example, Taxpayer argues the purchase of an "Info V.A.C. Therapy" which Taxpayer states, "provides a vacuum to drain wounds and promote faster healing," is exempt. Similarly, Taxpayer argues that its purchases of "hospital-grade air mattresses," bandages, urethral kits, surgical tape, wound dressings, orthopedic stockings, irrigation solutions, aerosol masks, oxygen masks, disposable catheters, and disposable syringes, are exempt from sales tax on the ground that the items are prescribed to one of its patients.

The Department is unable to agree that Taxpayer's purchase of these supplies and equipment are exempt from sales tax pursuant to IC § 6-2.5-5-18. A sale to a purchaser – such as Taxpayer – which subsequently uses the property in providing medical services is not a sale to that purchaser pursuant to a prescription; thus, the exemptions under IC § 6-2.5-5-18(a) and (b) are wholly inapplicable. As stated in 45 IAC 2.2-5-36, Indiana's gross retail tax "shall apply" to the purchase of "[s]urgical instruments, equipment and supplies" along with "[b]andages, splints, and all other medical supplies consumed in professional use" and "any other apparatus used in the practice of surgery or medicine." See also Sales Tax Information Bulletin 48 (August 2008). The items Taxpayer claims are exempt are medical supplies consumed in providing its medical services and are not exempt.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail Tax – Drugs.

DISCUSSION

Taxpayer argues that "[d]rugs prescribed to its patients . . ." are exempt from sales/use tax pursuant to the exemption found at IC § 6-2.5-5-19.

(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 6-2.5-1-7](#)) 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.

[45 IAC 2.2-5-35](#) provides:

(a) In general, all purchases of tangible personal property by a licensed practitioner are subject to gross retail tax. This exemption is limited to sales of certain drugs, insulin, oxygen, blood and blood plasma.

(b) Sales to licensed practitioners, of drugs which may be sold only on a prescription are exempt from the gross retail tax if the practitioner buys the drugs for direct consumption in the course of rendering professional services.

(c) Sales to licensed practitioners of insulin, oxygen, blood, or blood plasma are exempt from the gross retail tax if the practitioner buys such items for direct consumption in the course of rendering professional service.

[45 IAC 2.2-5-36](#) provides:

(a) The gross retail tax shall apply to the following purchase transactions made by licensed practitioners:

- (1) All office furniture, equipment and supplies.
- (2) Drugs of a type not requiring a prescription, when not purchased for resale.
- (3) Surgical instruments, equipment and supplies.
- (4) Bandages, splints, and all other medical supplies consumed in professional use.
- (5) X-Ray, diathermy, diagnostic equipment, or any other apparatus used in the practice of surgery or medicine.

(b) The purchase of items for resale by the physician or surgeon. In order to resell items the practitioner must be licensed as a retail merchant, and must quote the selling price of any items separately from the charge for professional service.

IC § 6-2.5-5-19, like all tax exemption provisions, is strictly construed against exemption from the tax.

Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." RCA Corp., N.E.2d at 100-01.

Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature, embodied in a statute constitutes the law." General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

Taxpayer maintains that certain of its purchases are exempt from sales tax. To a limited extent, Taxpayer is correct because it purchases non-legend drugs dispensed upon an original prescription or drug order and which are administered to patients confined to its facility. For example, Taxpayer purchased saline solution administered intravenously. The Department agrees that its purchases of saline solution qualify as a "non-legend" drug exempt pursuant to IC § 6-2.5-5-19(d) because the saline solution is a drug under IC § 6-2.5-1-17 and because the solution is administered to a "person confined to a hospital or health care facility."

Accordingly, to the extent that the following transactions contain purchases of non-legend saline solution dispensed upon an original prescription or drug order and administered intravenously to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 635185537; 636790724.

To the extent that the following transactions contain purchases of non-legend "Sodium C[h]loride" solution dispensed upon an original prescription or drug order and administered intravenously to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 636058706; 636301506; 636529354; 636790724; 637560744; 637826904; 637961489; 638673433; 638895461; 640094854; 640775186; 641711852; 642049966; 642189359; 643328627; 643555664; 643555684; 644258969; 644833602; 644972976; 645212275; 645699142; 646023185; 646778866; 647109524; 647244112.

To the extent that the following transactions contain purchases of non-legend "Protective Aloe Ointment" dispensed upon an original prescription or drug order and administered to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 643192372; 644121569.

To the extent that the following transactions contain purchases of non-legend "Neosporin" dispensed upon an original prescription or drug order and administered to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 643555664; 645699142.

To the extent that the following transactions contain purchases of non-legend "Dextrose" solution dispensed upon an original prescription or drug order and administered intravenously to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 643770566.

To the extent that the following transactions contain purchases of non-legend "9 percent sodium" administered dispensed upon an original prescription or drug order and intravenously administered to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 643555664; 645699142.

To the extent that the following transactions contain purchases of non-legend "Hydrogen peroxide" dispensed upon an original prescription or drug order and administered to patients confined to its facility, the following transactions are not subject to tax and should be removed from the audit. 644027021; 645699142; 637305057. In all other respects, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is sustained in part and denied in part.

SUMMARY

Taxpayer's purchase of medical supplies and equipment are subject to sales tax; purchases of non-listed "drugs" dispensed upon an original prescription or drug order and administered to persons confined in Taxpayer's hospital facility are exempt.

Posted: 04/30/2014 by Legislative Services Agency
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