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OKLAHOMA TAX COMMISSION

TAX POLICY DIVISION

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January 25, 2012

RE: LR-11-113 (Sales Tax Inquiry)

Dear

I am writing this letter in response to your request regarding Oklahoma sales tax. Set forth verbatim are the facts presented along with the responses thereto.

Facts:

Several oral surgery practices I file sales and use tax returns for the State of Oklahoma purchase bone grafting products from These are regulated products manufactured from donated human tissue or bovine tendon and can only be purchased on the order of a licensed physician.

is collecting sales tax on these products quoting section 710:65-13-169 from the Oklahoma Tax Commission Sales and Use Tax code which applies to a Medicare or Medicaid program recipient and medical appliances.

My interpretation of the code is the drugs purchased should fall under section 713:65-13-170 and be tax exempt under Oklahoma code. I have included package inserts from the products for your review.

Specific drugs in question are]

Response:

The information submitted does not demonstrate that the items at issue constitute drugs[1] for purposes of the sales tax exemption in Section 1357(9) of Title 68[2].

However, "sales of prosthetic devices to an individual for use by such individual" are exempt from sales tax in accordance with 68 O.S. § 1357(22). The sales tax exemption found in Section 1357(22) of Title 68 does not apply to purchases of prosthetic devices by health care providers.

Additionally, Section 1357.6 of Title 68 exempts sales of medical appliances, medical devices and other medical equipment, prosthetic devices, durable medical equipment[3] and mobility enhancing equipment[4] when the item is administered or distributed by a practitioner[5] or purchased or leased, by or on behalf of an individual, pursuant to a prescription or work order of a practitioner; and the item is furnished to a Medicare or Medicaid program recipient and the cost of said item will be reimbursed by Medicare or Medicaid.

Prosthetic device is defined in Section 1357.6(C) of Title 68 as follows:

> The term 'prosthetic device' means a replacement, corrective or supportive device, including repair and replacement parts for same, worn on or in the body to:
>
> (A) Artificially replace a missing portion of the body;
> (B) Prevent or correct physical deformity or malfunction; or,
> (C) Support a weak or deformed portion of the body.

* * *

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[1] Pursuant to Section 1352(8) of Title 68, drug means a compound, substance or preparation, and any component of a compound, substance or preparation:

a. recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopoeia of the United States, or office National Formulary, and supplement to any of them,
b. intended of use in the diagnosis, cure, mitigation, treatment, or prevention of disease, or
c. intended to affect the structure of any function of the body.

[2] Sales of drugs sold pursuant to a prescription written for the treatment of human beings by a person licensed to prescribe the drugs are exempt from the levy of sales tax in Oklahoma. This exemption does not apply to sales of over-the-counter drugs which mean a drug that contains a label that identifies the product as a drug as required by 21 C.F.R., Section 201.66. The over-the-counter-drug label includes:

a. a Drug Facts' panel, or
b. a statement of the "active ingredients(s)" with a list of those ingredients contained in the compound, substance or preparation. 68 O.S. § 1352(17).

[3] Durable medical equipment means equipment including repair and replacement parts for same, which can withstand repeated use, is primarily and customarily used to service a medical purpose, generally is not useful to a person in the absence of illness or injury; and is not worn in or on the body. The term does not include mobility enhancing equipment. 68 O.S. § 1357.6(D)

[4] Mobility enhancing equipment means equipment, including repair and replacement parts for same, which is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either in a home or a motor vehicle, is not generally used by persons with normal mobility, and does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. Mobility enhancing equipment does not include durable medical equipment. 68 O.S. § 1357.6(E).

[5] Practitioner means "a physician, osteopathic physician, surgeon, podiatrist, chiropractor, optometrist, pharmacist, psychologist, ophthalmologist, nurse practitioner, audiologist or hearing aid dealer or fitter who is licensed by the state as required by law." 68 O.S. § 1357.6(B)

Since the bone grafting products constitute a device worn in the body to prevent or correct a physical deformity or malfunction, it constitutes a prosthetic device pursuant to Section 1357.6(C) of Title 68.

Pursuant to Oklahoma Administrative Code 710:65-13-170(c), sales of medical appliances, medical devices and other medical equipment including prosthetic devices to hospitals, infirmaries, sanitariums, nursing homes, and similar institutions, and practitioners are taxable when such items are furnished to their patients as part of the services provided. The institutions, companies and practitioners are considered to be the users or consumers. In-state vendors collect and remit the tax on sales of such property to the institutions, and use tax is due on out-of-state purchases.

Under circumstances where hospitals, nursing homes, similar institutions and practitioners dispense or provide medical appliances, medical devices or medical equipment to Medicare or Medicaid patients, a refund may be claimed by the institution or practitioner for the sales or use taxes previously paid by the institution or practitioner on such items. The documentation set out below must be obtained as part of the claimant's records to substantiate the exemption claimed:

(1) Name and address of the purchaser or lessee or person on whose behalf the item is being purchased or leased;

(2) A copy of the prescription or work order; and

(3) A copy of the document which shows that the person on whose behalf the item is being purchased or leased is a Medicare or Medicaid patient.

Oklahoma Administrative Code 710:65-13-173(d).

Attached are copies of the cited statutory and administrative rule provisions.

This response applies only to the circumstances discussed in your written request of October 06, 2011. Pursuant to Oklahoma Administrative Code 710:1-3-73(e), this Letter Ruling may be generally relied upon only by the entity to whom it is issued, assuming that all pertinent facts have been accurately and completely stated, and there has been no change in applicable law.

Sincerely,

OKLAHOMA TAX COMMISSION

Marc Morrison

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Tax Policy Analyst