DEPARTMENT OF STATE REVENUE

Revenue Ruling # 2022-01ST
February 25, 2022

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ISSUES

Sales and Use Tax - Applicability of Medical Exemptions to Certain Devices

Authority: IC 6-2.5-1-17; IC 6-2.5-1-18; IC 6-2.5-1-23; IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-5-18; IC 6-2.5-5-19.5; IC 16-18-2-199; 45 IAC 2.2-5-27; *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.,* 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dept. of State Revenue v. Kimball Int'l Inc.,* 520 N.E.2d 454 (Ind. Ct. App. 1988).

A taxpayer ("Company") is seeking a determination regarding the following issues:

- Whether the sale of glucose test strips and lancets (as well as lancing devices) sold over the counter and pursuant to a prescription are subject to sales tax.
- Whether at home COVID test kits sold over the counter and pursuant to prescription are subject to sales tax.
- Further, whether the taxability of an at home COVID test kit would be impacted if it is fully administered at home as opposed to being required to be sent to a lab for results.
- Whether other types of at home test kits (such as pregnancy test kits, cholesterol kits, etc.) are subject to sales tax.

STATEMENT OF FACTS

Company is a nationwide pharmacy with locations in Indiana. Company sells drugs, medical devices, and other tangible personal property.

DISCUSSION

Taxpayer requests that the Department determine whether glucose test strips (and related paraphernalia) and at home COVID test kits are exempt from Indiana gross retail tax as pursuant to IC 6-2.5-5-18 or IC 6-2.5-5-19.5.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" 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." IC 6-2.5-3-2(a).

In general, all purchases of tangible personal property are subject to sales and/or use tax unless an enumerated exemption from sales and/or use tax is available. In applying any tax exemption, the general rule in Indiana is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.,* 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption 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 100-101.

Regarding whether glucose test strips and lancets (as well as lancing devices) are exempt when sold over the counter or pursuant to a prescription, IC 6-2.5-5-19.5 provides an exemption for blood glucose monitoring supplies. It provides in relevant part the following:

(b) For purposes of this section, "blood glucose monitoring supply" means blood glucose measuring strips, lancets, and other similar diabetic supplies furnished without charge.
. . .

(d) Transactions involving the following are exempt from the state gross retail tax:
(1) . . . a blood glucose monitoring supply, and the packaging and literature for a blood glucose monitoring supply.
(2) Tangible personal property that will be used as a . . . blood glucose monitoring supply or that will be processed, manufactured, or incorporated into:
(A) a . . . blood glucose monitoring supply; or
(B) the packaging or literature for a . . . blood glucose monitoring supply.
(3) Blood glucose meters and the packaging or literature for a blood glucose meter furnished without charge by a diabetic supply distributor.

Glucose test strips, lancets, and lancing devices would fall within the definition of "blood glucose monitoring supplies." However, the definition provided in IC 6-2.5-5-19.5(a) dictates that blood glucose monitoring supplies are "furnished without charge." Therefore, if such supplies are sold, whether pursuant to a prescription or not, they would not meet this definition, and thus would not be exempt under IC 6-2.5-5-19.5.

IC 6-2.5-5-18 also provides an exemption for certain medical devices and equipment. It states as follows:

(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) Transactions involving the following are exempt from the state gross retail tax if the end user acquires the property upon a prescription or drug order (as defined in IC 16-42-19-3) from a licensed practitioner:
(1) Durable medical equipment.
(2) Mobility enhancing equipment.
(3) Prosthetic devices, including artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, and contact lenses.
(4) Other medical supplies or devices that are used exclusively for medical treatment of a medically diagnosed condition, including a medically diagnosed condition due to:
(A) injury;
(B) bodily dysfunction; or
(C) surgery.
(5) Hearing aid devices that are worn on the body and designed to aid, improve, or correct defective human hearing, including:
(A) parts;
(B) attachments;
(C) batteries; or
(D) accessories;
reasonably necessary for use of a hearing aid device.
(6) Legend drugs and nonlegend drugs, if:
(A) a registered pharmacist makes the sale to a patient upon the prescription of a licensed practitioner; or
(B) a licensed practitioner makes the sale to a patient.
(7) A nonlegend drug, if:
(A) the nonlegend drug is dispensed upon an original prescription or a drug order (as defined in IC 16-42-19-3); and
(B) the ultimate user of the drug is a person confined to a hospital or health care facility.
(8) Food, food ingredients, and dietary supplements that are sold by a licensed practitioner or pharmacist.
(d) Transactions involving the following are exempt from the state gross retail tax if the patient acquires the property for the patient's own use without a prescription or drug order:
(1) Hearing aid devices that are:
(A) worn on the body and designed to aid, improve, or correct defective human hearing, including:
(i) parts;
(ii) attachments;
(iii) batteries; or
(iv) accessories;
reasonably necessary for the use of a hearing aid device; and
(B) fitted or dispensed by a person licensed or registered for that purpose.
(2) Prosthetic devices, including artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, and contact lenses, that are:
(A) used to aid, improve, or correct human movement and operation; and
(B) fitted or dispensed by a person licensed or registered for that purpose.

(3) Colostomy bags, ileostomy bags, and the medical equipment, supplies, and devices used in conjunction with those bags.
(4) Devices and equipment used to administer insulin.
(5) Insulin, oxygen, blood, and blood plasma, if purchased for medical purposes.

The exemption at IC 6-2.5-5-18(c) requires that the item must be prescribed to the end user purchaser by a licensed practitioner in order for the transaction to qualify for the exemption. A "prescription" is defined by IC 6-2.5-1-23 as "an order, a formula, or a recipe issued in any form of oral, written, electronic, or other means of transmission by a licensed practitioner authorized by Indiana law." The Department's regulations at 45 IAC 2.2-5-27 further clarifies the definition of "prescribed" as follows:

(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 [subsection (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.

IC 6-2.5-5-18(c) requires that any equipment subject to the exemption must be sold to an end user "upon a prescription or drug order . . . from a licensed practitioner." In other words, durable medical equipment, prosthetic devices, or other equipment listed in this subsection are exempt only when the end user acquires the product with a prescription from a licensed practitioner. The exemption at IC 6-2.5-5-18(d) however, does not require a prescription be issued to the end user patient.

In order for glucose test strips, lancets, and lancing devices to be exempt under IC 6-2.5-8-18(c) and (d), one of the requirements is that they fall within one of the enumerated categories of medical supplies or devices. The only categories that the glucose test strips, lancets, and lancing devices could possibly fall within subsection (c) or (d) would be durable medical equipment in subpart (C)(1), or other medical supplies or devices in subpart (c)(4). IC 6-2.5-1-18 defines "durable medical equipment" as follows:

(a) "Durable medical equipment" means equipment, including repair and replacement parts for the equipment, that:
(1) can withstand repeated use;
(2) is primarily and customarily used to serve a medical purpose;
(3) generally is not useful to a person in the absence of illness or injury; and
(4) is not worn in or on the body.
The term does not include mobility enhancing equipment.
(b) As used in this section, "repair and replacement parts" includes all components or attachments used in conjunction with durable medical equipment.

While lancets and lancing devices might be able to withstand repeated use, the strips themselves cannot and in fact are designed to be used one time only. Therefore, glucose test strip and assorted paraphernalia would not meet the definition of durable medical equipment.

In order to qualify as "other medical supplies or devices" under subpart (c)(4), the glucose test strip and assorted paraphernalia would have to be "used exclusively for medical treatment." However, the strips are not used for medical treatment. They are used as a diagnostic device in order to determine whether treatment is necessary.

Further, it is important to note that all of the items that may be exempt in IC 6-2.5-5-18(c) and (d) are used to treat the end user patient. The statute does not include any items that are diagnostic in nature. Therefore, the glucose test strip and assorted paraphernalia are not exempt under IC 6-2.5-5-18 either. As no other exemption in IC 6-2.5-5 would apply, the sale of glucose test strip and assorted paraphernalia to an end user patient is subject to Indiana sales tax.

Regarding whether at home COVID test would be exempt under IC 6-2.5-5-18(c) or (d), it must first be determined whether such a test would fit within any of the categories in the statute. An at home COVID test would not fall under the definition of "durable medical equipment" at subpart (c)(1) because it cannot withstand repeated use. An at home COVID test would also not qualify as "other medical supplies or devices" under subpart (c)(4), because the test would have to be "used exclusively for medical treatment." However, at home COVID tests are not used for medical treatment. They are used as a diagnostic device in order to determine whether treatment is necessary.

It has been suggested that perhaps an at home COVID test is a drug. IC 6-2.5-1-17 defines a "drug" as follows:

"Drug" means a compound, substance, or preparation and any component of a compound, substance, or preparation that is:
(1) recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, and supplement to any of them;
(2) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or
(3) intended to affect the structure or any function of the body.
The term does not include food and food ingredients, dietary supplements, or alcoholic beverages.

An at home COVID test would not be considered a "drug," and it is likely that none of the individual items (like a lancet, dilutant, etc.) would be considered drugs either. IC 6-2.5-1-17 includes as one of the qualifications for being a drug that it the item must be "intended for use in the **diagnosis,** cure, mitigation, treatment, or prevention **of disease" (emphasis** added). However, a drug first and foremost has to be "a compound, substance, or preparation [or] any component of a compound, substance, or preparation." Within the plain meaning of these terms and the context in which they are used, the test or the individual items don't constitute a compound, substance, or preparation or a component of a compound, substance, or preparation, and although one could make the case that they do, it was not the statutory intent to include lancets, etc. within the meaning of "drug."

Furthermore, looking closer at the requirements of IC 6-2.5-5-18(a), a "legend drug" is tied to the definition at IC 16-18-2-199, which provides as follows:

"Legend drug", for purposes of IC 16-42, means a drug that is:
(1) subject to 21 U.S.C. 353(b)(1); or
(2) listed in the Prescription Drug Product List as:
(A) published in United States Department of Health and Human Services Approved Drug Products with Therapeutic Equivalence Evaluations, Tenth Edition, (1990) [colloquially known as the "Orange Book"; and
(B) revised in United State Department of Health and Human Services, Approved Drug Products with Therapeutic Equivalence Evaluations, Cumulative Supplement to the Tenth Edition, Number 10 (1990).

An at home COVID test (or individual components) could not be a "legend" drug under IC 16-18-2-199, because it is not the type requiring a physician's supervision (per subpart (1), "a drug . . . subject to 21 U.S.C. 353(b)(1)"), it is not in the 10th edition of the "Orange Book" (per subpart (2)(A)), and it is not insulin (per subpart (2)(B)). On the other hand, while at home COVID tests are available over-the-counter, they cannot be a "nonlegend drug" under IC 6-2.5-5-18(b) because an at home COVID test doesn't constitute a compound, substance, or preparation or a component of a compound, substance, or preparation, and further, the "ultimate user of the drug [must be] a person confined to a hospital or health care facility," so they would be unlikely to purchase an at home COVID test from a pharmacy.

Again, all of the items that may be exempt in IC 6-2.5-5-18(c) and (d) are used to treat the end user patient. The statute does not include any items that are diagnostic in nature, which an at home COVID test is. Therefore, an at home COVID test is not exempt under IC 6-2.5-5-18. As no other exemption in IC 6-2.5-5 would apply, the sale of an at home COVID tests is subject to Indiana sales tax regardless of whether it is subject to a prescription or not.

It further would not matter whether the at home COVID test was fully administered at home or whether the purchaser had to send in the test to a lab to get the results. Either way, the COVID test is still diagnostic in nature and does not fall within any of the specific items in IC 6-2.5-5-18.

Similar to an at home COVID test, other at home tests purchased over the counter, like a pregnancy test or a cholesterol test, would not be exempt under IC 6-2.5-5-18. They are likewise diagnostic in nature, and do not fall within any of the specific items in IC 6-2.5-5-18. As no other exemption in IC 6-2.5-5 would apply, the sale of these at home tests are subject to Indiana sales tax regardless of whether they are subject to a prescription or not.

RULING

Neither glucose test strips (and related paraphernalia) nor at home COVID test kits are exempt from Indiana gross retail tax. The fact that they may be prescribed to the end user purchaser is immaterial, as they do not fall within any of the specific items in IC 6-2.5-5-18. No other exemption in IC 6-2.5-5 would apply either.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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