

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(24)S
Sales Tax
May 20, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020318A

On March 18, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from W.A. Butler Co., 5600 Blazer Parkway, Dublin, OH 43017.

The issue raised by Petitioner, W. A. Butler Co., is whether its sales of drugs and medicines to New York State veterinarians, that are in turn sold to farmers, are not subject to sales tax as sales for resale.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a distributor of veterinary pharmaceuticals and supplies, whose customers include veterinarians located within the State of New York. Recently Petitioner established a new service to its veterinary customers called Pharm Link. Pharm Link entails an agreement between Petitioner and the veterinarian whereby the veterinarian assumes the role of a retailer. Basically, the veterinarian places an order of drugs and medicines with Petitioner and resells them directly to his or her customer, who is a farmer, for use on farm animals used in production of tangible personal property for sale. A separate account is established for each "ship-to" address, which encompasses each farm the veterinarian has established as a customer. The products are shipped directly from Petitioner to the farm for the farmer's use and consumption.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

A sale of tangible personal property to any person for any purpose, other than
(A) for resale as such. . . .

Section 1105(a) of the Tax Law imposes sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1110(a) of the Tax Law imposes a use tax "for the use within this state . . . of any tangible personal property purchased at retail."

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(6) (A) Tangible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.

* * *

(f) Services rendered by a veterinarian licensed and registered as required by the education law which constitute the practice of veterinary medicine as defined in said law, including hospitalization for which no separate boarding charge is made, shall not be subject to tax under paragraph (3) of subdivision (c) of section eleven hundred five, but the exemption allowed by this subdivision shall not apply to other services provided by a veterinarian to pets and other animals, including, but not limited to, boarding, grooming and clipping. Articles of tangible personal property designed for use in some manner relating to domestic animals or poultry, when sold by such a veterinarian, shall not be subject to tax under subdivision (a) of section eleven hundred five or under section eleven hundred ten. However, the sale of any such articles of tangible personal property to a veterinarian shall not be deemed a sale for resale within the meaning of paragraph (4) of subdivision (b) of section eleven hundred one and shall not be exempt from retail sales tax.

Section 1119(a) of the Tax Law provides, in part:

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (5) on the sale to or use by a veterinarian of drugs or medicine if such drugs or medicine are used by such veterinarian in rendering services, which are exempt pursuant to subdivision (f) of section eleven hundred fifteen of this chapter, to livestock or poultry used in the production for sale of tangible personal property by farming or if such drugs or medicine are sold to a person qualifying for the exemption provided for in paragraph (6) of subdivision (a) of section eleven hundred fifteen of this chapter for use by such person on such livestock or poultry. . . . (Emphasis added)

Section 526.6(b)(2) of the Sales and Use Tax Regulations provides:

A sale of tangible personal property designed for use in some manner relating to domestic animals or poultry, when sold to a licensed veterinarian, is deemed a retail sale, notwithstanding a subsequent sale of such item of tangible personal property by said veterinarian. . . .

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

Section 528.24 of the Sales and Use Tax Regulations provides, in part:

* * *

(a)(3) . . . exemption is allowed for articles of tangible personal property designed for use in some manner relating to domestic animals or poultry, when sold by . . . a licensed veterinarian.

* * *

(c) *Purchases by a veterinarian.* (1) Purchases of tangible personal property by a veterinarian for use in the practice of veterinary medicine and performing taxable services are subject to tax.

(2) The purchase by a veterinarian of tangible personal property designed for use in some manner relating to domestic animals or poultry is deemed a retail sale, notwithstanding a subsequent sale of such items by the veterinarian.

Example 1: The purchase of medicine . . . whether used by a veterinarian in performing a service or sold to others, is subject to tax at the time of purchase by a veterinarian. (Emphasis added)

* * *

(d)(3) Veterinarians who carry on taxable activities are required to register as vendors, collect the tax and file returns.

Section 534.3 of the Sales and Use Tax Regulations provides, in part:

(a) *Authorization.* Where a sales or compensating use tax has been correctly, legally, and constitutionally imposed and paid on the purchase of tangible personal property, a refund or credit of State and local taxes paid pursuant to subdivision (a) of section 1105 or section 1110 of the Tax Law on the sale or use will be allowed to the purchaser or user when, to the satisfaction of the Department of Taxation and Finance, the purchaser shows that such tangible personal property was used in one of the following manners:

* * *

(5) drugs or medicine sold to or used by a veterinarian if such drugs or medicine were:

(i) used by the veterinarian in rendering services, exempt pursuant to section 1115(f) of the Tax Law, to livestock or poultry used in the production of tangible personal property by farming; or

(ii) sold to a person entitled to claim the farmer's exemption under section 1115(a)(6) of the Tax Law for use by such person on production livestock or poultry. . . .

(f) *Drugs or medicine used by veterinarians in rendering certain services to livestock and poultry used in production, or sold to farmers for such use.* A veterinarian may apply for a credit or refund of sales tax paid on his purchase of drugs and medicines:

* * *

(2) sold to a person entitled to the farming exemption provided by section 1115(a)(6) of the Tax Law for his use on livestock or poultry used in the production of tangible personal property for sale, by farming . . .

* * *

Example 1: A veterinarian treats several cows in a dairy herd for mastitis. The veterinarian may apply for a credit or refund of the sales tax paid at the time of purchase on the drugs and medicine he uses to treat the affected cows. Additionally, he may claim a credit or refund of sales tax paid on drugs or medicine he sells the farmer to treat the herd. (Emphasis added)

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Opinion

Petitioner is a veterinary drug supplier whose customers include veterinarians located in New York State. Petitioner maintains that its Pharm Link sales of drugs and medicines to New York veterinarians should qualify as sales for resale under Section 526.6(c)(1) of the Sales and Use Tax Regulations, since the drugs and medicines are intended to be resold by the veterinarians for use by their customers on farm animals used in the production, for sale, of tangible personal property by farmers.

Generally, a transaction to sell tangible personal property where the purpose of the purchaser is to resell such property would be considered a sale for resale and would not be subject to New York State or local sales tax, provided the seller timely accepted, in good faith, a properly completed Form ST-120, *Resale Certificate*, from the purchaser. However, Petitioner's transaction is an exception to this rule since Petitioner's sales of drugs and medicines to veterinarians fall under the provisions of Sections 1115(f) and 1119(a)(5) of the Tax Law. See Matter of William J. Twining, DVM, Dec State Tax Commission, January 12, 1982, TSB-H-82(15)S; Matter of Delmar Animal Hospital, Dec State Tax Commission, July 28, 1980, TSB-H-80(137)S.

In 1967 Article 28 of the Tax Law was amended by Chapter 269 of the Laws of 1967 which added Section 1115(f) to the Tax Law, providing that sales of certain veterinary services, and sales of tangible personal property designed for use with respect to domestic animals or poultry, by veterinarians are not subject to sales tax. However, all purchases of such property by veterinarians, whether such property is sold or transferred to the customer, are subject to sales tax.

Though direct purchases of drugs and medicines by a farmer from Petitioner might be exempt under Section 1115(a)(6) of the Tax Law as tangible personal property used or consumed predominantly in the production of tangible personal property for sale by farming, a veterinarian's purchase of such drugs and medicines used in the treatment of farm animals is taxable pursuant to the provisions of Section 1115(f). Section 1119(a) of the Tax Law was amended by Chapter 604 of the Laws of 1978 to provide that a veterinarian may receive a refund or credit for the taxes paid on his or her purchases of drugs or medicines used in rendering services, exempt pursuant to Section 1115(f) of the Tax Law, to livestock or poultry used in the production for sale of property by farming or sold to a person qualifying for the exemption provided for in Section 1115(a)(6) of the Tax Law for use by such person on such livestock or poultry. In short, the chosen statutory mechanism was to allow for a refund or credit of the taxes paid on these purchases, rather than to make these purchases exempt from tax. See Section 1119(a)(5) of the Tax Law.

Under the provisions of Section 1115(f) of the Tax Law, veterinarians' purchases of drugs and medicines designed for use with respect to domestic animals or poultry are deemed to be retail sales as defined under Section 1101(b)(4) of the Tax Law and are therefore subject to sales or use tax imposed under Section 1105(a) or 1110 of the Tax Law. See Technical Services Bureau Memorandum, Credit or Refund for Veterinarians, February 5, 1979, TSB-M-79(6)S. Accordingly, Petitioner's sales of such drugs and medicines to New York State veterinarians are subject to the

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imposition of sales or use tax in accordance with Section 1105(a) or 1110 of the Tax Law. See J. Leon Lascoff & Son, Inc., Adv Op Comm T&F, October 22, 1990, TSB-A-90(50)S; William J. Twining, DVM, *supra*; Delmar Animal Hospital, *supra*. As previously noted, the veterinarians are entitled to a refund or credit for tax paid on their purchase of drugs and medicines used by the veterinarians in rendering services exempt pursuant to Section 1115(f) of the Tax Law to livestock or poultry used in the production for sale of tangible personal property by farming, or sold to a person qualifying for the exemption provided for in Section 1115(a)(6) of the Tax Law for use by such person on livestock or poultry. See Section 1119(a)(5) of the Tax Law.

DATED: May 20, 2003

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.