

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

TSB-A-03(33)S
Sales Tax
September 2, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030123A

On January 23, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Battenkill Veterinary Bovine, PC, POB 196, 516 State Route 29, Greenwich, NY 12834.

Petitioner is a New York State professional service corporation employing licensed veterinarians. Petitioner provides veterinary services to livestock and poultry owners engaged in farming. Certain items used by the veterinarians in the provision of these services are also sold to farmers to diagnose and treat diseases in their own animals. Petitioner sets forth a number of questions concerning the application of sales and compensating use taxes to its purchases and sales of these items. These questions are answered in the opinion portion of this Advisory Opinion.

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. . . .

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

* * *

(b)(2) 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. . . .

* * *

(c) *Resale exclusion.* (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 527.1(b) of the Sales and Use Tax Regulations provides:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Example: A vendor sells a package containing assorted cheeses, a cheese board and a knife for \$15. He is required to collect tax on \$15.

Section 528.4 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) *Drugs and medicines.* (1) *Drugs and medicines* mean:

(i) articles, whether or not a prescription is required for purchase, which are recognized as drugs or medicines in the *United States Pharmacopeia*, *Homeopathic Pharmacopeia of the United States*, or *National Formulary*, and intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans;

(ii) articles (other than food) intended to affect the structure or any function of the human body.

* * *

(3) Products consumed by humans for the preservation of health include other substances used internally or externally, which are not ordinarily considered drugs or medicines. (Emphasis added)

* * *

Example 6: Any diagnostic drug, chemical or other substance which is used internally or externally . . . is exempt.

* * *

(g) Supplies.

* * *

Example 2: Bandages, gauze and dressings are medical supplies.

Example 3: Disposable hypodermic syringes and litmus paper . . . are medical supplies.

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

Services rendered by veterinarians.

(a) *Exemption.* (1) The exemption is allowed for services rendered by a licensed veterinarian which constitute the practice of veterinary medicine, including hospitalization for which no separate boarding charge is made.

(2) The exemption is not applicable to other services provided by a veterinarian, including but not limited to boarding, grooming and clipping.

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

(b) *Definitions.* (1) Practice of veterinary medicine. Section 6701 of the Education Law defines the practice of the profession of veterinary medicine as diagnosing, treating, operating or prescribing for any animal disease, pain, injury, deformity or physical condition. *Animal* includes every living creature except human beings.

(2) Use of title *veterinarian*. Section 6702 of the Education Law provides that only a person licensed or exempt under article 135 of the Education Law shall practice veterinary medicine or use the title *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, collars, flea spray, food or brushes, 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.

Example 2: The sale by a veterinarian of collars, flea spray, brushes, food and medicine which are directly related to the well-being of animals and pets is not subject to tax.

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:

(1) used in the practice of veterinary medicine on livestock or poultry, exempt pursuant to section 1115(f) of the Tax Law, used in the production of tangible personal property for sale, by farming;

(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; or

(3) provided the drugs and medicine are used by the veterinarian as described above within three years after the date such tax was payable to the Department of Taxation and Finance and that an application for a credit or refund is filed within three years after the date such tax was payable to the Department of Taxation and Finance.

* * *

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 refund of sales tax paid on drugs or medicine he sells the farmer to treat the herd.

Example 2: A veterinarian treats an injured racehorse and sells the trainer drugs and medicine to continue treatment. Since the racehorse is not used in the production of tangible personal property for sale, by farming, the veterinarian may not file a claim for credit or refund of the tax paid on such drugs and medicine since a refund or credit is not allowable.

Opinion

The following are the questions presented by Petitioner concerning its purchases and sales and the appropriate answers:

1. **Question.** With regard to the refund or credit allowed veterinarians under section 1119(a)(5) of the Tax Law and section 534.3(f) of the Sales and Use Tax Regulations for sales tax paid on certain drugs or medicine, what is meant by the term “drugs or medicine”?

Answer. The Sales and Use Tax Regulations do not provide a definition of the term “drugs and medicines” specifically for the purposes of the refund or credit provided to veterinarians as authorized in section 1119(a)(5) of the Tax Law. For federal purposes, drugs are defined as (a) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia, or official National Formulary; (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man *or other animals*; and (c) articles (other than food) intended to affect the structure or any function of the body of man *or other animals* (see 21 USCS Section 321(g)(1)). Similarly, the New York State Education Law defines the term “drugs” as articles recognized in the official compendiums, or intended for use in the diagnosis, cure, etc., of disease in man or animals, or non-food articles intended to affect the structure or function of the body of man or animals, and excludes from the term, devices and their components, parts or accessories. See section 6802(7) of the Education Law. Though the term “drugs and medicines” is not defined for purposes of section 1119(a)(5) of the Tax Law, such term is defined for purposes of the exemption provided in section 1115(a)(3) of the Tax Law for drugs and medicines for use by humans. See section 528.4(b)(1) of the Sales and Use Tax Regulations. The regulatory definition in such section 528.4(b)(1) as applicable to drugs and medicines consumed by humans is comprehensive and derived from the definitions provided in the federal statute and the Education Law. It is not unreasonable, therefore, to apply such definition in determining what constitutes a drug or medicine for purposes of the refund and credit provisions of section 1119(a)(5) respecting drugs or medicines used by veterinarians, or sold by veterinarians for use, in treating animals used in farm production. Thus, an item which is intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in animals and is recognized as a drug or medicine in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary; or a non-food item which is intended to affect the structure or function of the animal’s body, is considered to be a drug or medicine for purposes of applying the refund or credit in section 1119(a)(5) of the Tax Law. See section 528.4(b)(1) of the Sales and Use Tax Regulations.

2. **Question.** A) Which of the following items would qualify for a refund or credit of sales tax paid on their purchases by Petitioner based on the scenario described below:

- | | |
|----------------------------|---------------------|
| a) Reagent X | d) intravenous tube |
| b) Medications A, B, and C | e) sutures |
| c) syringe and needle | f) bandage |

Scenario

Petitioner purchases several items necessary to treat cows used in farm production for mastitis, and pays sales tax on such purchases. A farmer calls Petitioner to examine a cow and a veterinarian employed by Petitioner performs a physical exam on the cow, takes a sample of milk, and mixes the milk with Reagent X. Based on the result of this test, the veterinarian diagnoses mastitis.

Treatment involves Medication A which is infused into the cow's udder. Medication A is a product pre-packaged in a syringe for individual use. Further treatment involves Medication B which comes in a bottle. The veterinarian uses a disposable syringe and a disposable needle to draw Medication B from the bottle and inject it into the cow. Further treatment involves Medication C which is administered intravenously to the cow through a tube that the veterinarian uses many times and sterilizes between uses.

In the course of treatment, the cow becomes fractious, bangs its head, and creates a laceration on its face. The veterinarian uses sutures to close the wound.

The next day, the farmer finds another sick cow. The farmer comes to Petitioner and purchases Reagent X, Medications A, B, and C, a syringe and needle, and a tube for intravenous administration of Medication C. The farmer also purchases a bandage to apply to another cow to cure a case of foot rot. Except for the syringe, needle, and sutures, the farmer could have purchased all of these items at the feed store next door because they are available over the counter, without a prescription. Alternatively, the farmer could seek a prescription from Petitioner and buy these items from veterinarians in another state that sell them over the Internet.

Petitioner charges the farmer fees for services performed and items purchased. Petitioner does not charge sales tax.

Answer. None of the purchases of tangible personal property by Petitioner for use in its practice of veterinary medicine (or in performing taxable services) are purchases for resale. All such purchases are, under section 1115(f) of the Tax Law, subject to the sales and use tax. In the above scenario, section 1119(a)(5) of the Tax Law allows Petitioner a refund or credit of sales and use taxes paid on its purchases of drugs or medicines that are used in its practice of veterinary medicine on cows used in farm production, or that are ultimately resold to the farmer for use on such cows.

Items (a), (c), (d), (e), and (f) are not drugs or medicines which qualify for the refund or credit described in section 1119(a)(5) of the Tax Law. Item (a), *Reagent X*, is a diagnostic chemical or substance that as used in this case is a medical supply item. Items (c), *syringe and needle*, (d), *intravenous tube*, (e), *sutures*, and (f), *bandage*, are also medical supplies.

See section 528.4(g) of the Sales and Use Tax Regulations. Accordingly, Petitioner is not eligible for a refund or credit of the sales tax paid on items (a), (c), (d), (e), and (f).

With regard to Item (b), assuming *Medications A, B and C* are recognized as drugs or medicines in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary, Petitioner is eligible for a refund or credit of sales tax paid on such items. However, the syringe, needle and tube used to administer the Medications A, B, and C are not drugs or medicine, but rather medical supply items, and thus not items for which section 1119(a)(5) authorizes a refund

B) If a farmer had a farmer's exemption certificate on file, would the purchase of any of the items by the feed store or by an Internet pharmacy run by veterinarians in another state be subject to tax? If so, would the feed store owner be eligible for a refund?

Answer. Generally, the purchase of tangible personal property by a vendor for resale is not subject to New York State sales tax. To purchase items for resale without paying sales tax, the vendor must furnish a properly completed Form ST-120, *Resale Certificate*, to its supplier. Since the feed store is not subject to the provisions of section 1115(f) of the Tax Law regarding purchases of tangible personal property by veterinarians, it may purchase the items without payment of the sales tax under the resale exclusion contained in section 1101(b)(4)(i)(A) of the Tax Law.

Purchases made by an out of state pharmacy which are delivered to that pharmacy are not subject to New York State sales tax. However, sales by that pharmacy of property which is delivered in New York may be subject to New York State sales and use tax.

Since the feed store may make purchases without payment of sales tax, the issue of refund eligibility is moot.

3. **Question.** When can a veterinarian purchase items for resale and not pay sales tax at the time of purchase?

Answer. A veterinarian cannot purchase any items of tangible personal property for use in its business of providing veterinary medical services without payment of sales tax. See section 1115(f) of the Tax Law and section 528.24(c) of the Sales and Use Tax Regulations. This includes all veterinary equipment, instruments, and supplies.

4. **Question.** Does the status of the owners of a business as veterinarians preclude them from operating with resale certificates in all circumstances?

Answer. No. Section 1115(f) of the Tax Law explicitly provides that sales of articles of tangible personal property designed for use in some manner relating to domestic animals or poultry by a veterinarian are not subject to tax. Section 1115(f) also provides that purchases

of *such articles* (i.e., tangible personal property designed for use in some manner relating to domestic animals or poultry) are not purchases for resale and are not exempt from tax. See Matter of William J. Twining, DVM, Dec St Tx Comm, January 12, 1982, TSB-H-82(15)S; Matter of Delmar Animal Hospital, Dec St Tx Comm, July 28, 1980, TSB-H-80(137)S. Thus, if a veterinarian were purchasing for sale articles of property that are not designed for use in some manner relating to domestic animals or poultry, it would appear that the veterinarian was not, pursuant to section 1115(f), prohibited from making such purchases for resale without payment of the tax to the supplier. In order to issue a resale certificate on the purchase of such items, the veterinarian must be registered as a vendor. Since such items are not within the classification of items that a veterinarian may sell exempt from tax pursuant to section 1115(f), the veterinarian must collect and remit applicable sales tax on such sales.

5. **Question.** Can Petitioner establish a separate business from its veterinary practice to be engaged only in the resale of products (providing no services)?

Answer. If a retail store were established as a legal entity separate and apart from Petitioner's veterinary practice to sell, deliver and bill customers for tangible personal property such as drugs, medicines and other products designed for use in some manner relating to domestic animals and poultry, while Petitioner separately performed and billed veterinary services, the store would be required to be registered as a sales tax vendor. As a registered vendor, such entity could make purchases of tangible personal property for resale without paying sales tax and would be required to collect tax on receipts from sales of taxable tangible personal property and services. See Jacqueline Holtzman, Adv Op Comm T&F, April 17, 2001, TSB-A-01(12)S. Similarly, if Petitioner were to create a separate pharmacy operation, distinct from Petitioner's veterinary practice, such pharmacy could be operated pursuant to the provisions of Article 28 of the Tax Law relating to vendors other than those engaged in the practice of veterinary medicine. The pharmacy could purchase drugs, medicines, medical equipment and supplies, and other tangible personal property designed for use in some manner relating to domestic animals and poultry for resale, without being required to pay tax on such purchases. Sales of such products would be subject to sales and use tax unless otherwise eligible for appropriate exemptions. For example, sales of dog collars and leashes, or bandages and animal food, etc. would be subject to tax. Where applicable, the pharmacy or retail store could accept appropriate exemption documents from customers such as farmers and commercial horse boarding operators.

However, this opinion does not address whether the professional licensing regulations under the State Education Law, the laws regulating professional limited liability companies and professional corporations, and such other laws as may be applicable, would allow Petitioner

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to create and operate such separate businesses. Since such arrangement is largely dependent upon licensing and regulatory laws which are not within the jurisdiction of the Department of Taxation and Finance, this Opinion makes no determination of the legality and viability of such arrangement other than in relation to the application of the sales and use tax.

6. **Question.** Are there veterinary clinics in New York State that use resale certificates?

Answer. As noted above, such use would generally not be an authorized or appropriate use of that exemption certificate.

DATED: September 2, 2003

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