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Directive 91-5: Application of Sales and Use Tax to Sales and Distribution of Prescription and Over-The-Counter Medicines

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ISSUE 1: Are sales by manufacturers or distributors of prescription medicines for human use, to pharmacies, registered physicians, nursing homes, hospitals or other health organizations subject to Massachusetts sales tax?

DIRECTIVE 1: Lawful sales by manufacturers or distributors of prescription medicines, as defined in this Directive, for human use to pharmacies, registered physicians, nursing homes, hospitals or other health organizations for direct medication or treatment of patients are exempt from sales tax under G.L. c. 64H, § 6(l). The exemption applies whether such prescription medicines are dispensed directly to ultimate users, or resold. Sales of prescribed medicines for other purposes, or of other prescribed substances such as those used for diagnosis and not for direct medication or treatment of patients are not exempt under G.L. c. 64H, § 6(l).

To substantiate a claim for exemption, the seller need not require such organizations to submit a resale certificate. However, the seller must maintain appropriate records, including records that verify the classification of such medicines as prescription medicines, as well as any other records normally required to be maintained in the dispensing of prescription medicines.

ISSUE 2: Are sales of over-the-counter medicines for human use, subject to tax?

DIRECTIVE 2: Sales of "over-the-counter" medicines, as defined in this Directive, for human use are generally taxable. However, sales of over-the-counter medicines for human use are exempt from sales tax if such medicines are:

prescribed by a registered physician, as defined in this Directive,
for the treatment of a disease or for direct medication of patients; and
dispensed pursuant to a prescription of a registered physician.

To substantiate a claim for exemption, the seller must maintain appropriate records, including records that verify that such over-the-counter medicines were dispensed pursuant to a prescription, and any other records normally required to be maintained in the dispensing of prescription medicines.

ISSUE 3: Are samples of prescription medicines for human use distributed by manufacturers to pharmacies, registered physicians, nursing homes, hospitals, or other health organizations, subject to sales or use tax?

DIRECTIVE 3: Samples of prescription medicines for human use, distributed by manufacturers to pharmacies, registered physicians, nursing homes, hospitals, or other health organizations, are not subject to sales or use tax. Samples of over-the-counter medicines distributed by manufacturers to these organizations are subject to use tax. Manufacturers that distribute samples of over-the-counter medicines must remit the use tax due on such samples to the Commissioner.

DISCUSSION OF LAW:

Massachusetts law imposes a five percent sales tax on retail sales of tangible personal property in

Massachusetts by any vendor, unless otherwise exempt. G.L. c. 64H, § 2. A retail sale is defined as "a sale of tangible personal property for any purpose other than resale in the regular course of business." G.L. c. 64H, § 1. Although the burden of the sales tax falls upon the purchaser, the vendor is generally responsible for collecting and remitting the tax to the Commissioner. G.L. c. 64H, § 3.

In general, all sales of tangible personal property are presumed to be retail sales subject to the sales tax. The vendor has the burden of proving that such sales are not subject to sales tax. A vendor satisfies its burden of proof if it takes a resale certificate in good faith from the purchaser. G.L. c. 64H, § 8(b). If a sale is not for resale, it is a retail sale and is subject to the sales tax, unless exempted by another provision of law.

The exemptions to the sales tax are found in G.L. c. 64H, § 6. The relevant exemption, section 6(l), provides: "[s]ales of medicine....on prescriptions of registered physicians...." are exempt from sales tax.

1. "Medicine"

Although the Massachusetts tax statutes do not define "medicine," the Department's interpretation of the term accords with its common meaning, as evidenced by the definition in Webster's New Collegiate Dictionary (1979) (medicine is "a substance or preparation used in treating disease;....something that affects well-being"). See e.g. Letter Ruling 88-4. Therefore, substances used for diagnosis and not for direct medication or treatment of patients are not exempt under this provision, even if such substances are sold on prescription. See e.g. Letter Rulings 88-4; 79-15.

2. "On prescription"

For purposes of G.L. c. 64H, § 6(l), the phrase, medicine "on prescription" encompasses two categories of medicine:

1. medicines that are classified by law generically as "prescription medicines" (those which may be dispensed legally only by prescription); and
2. medicines that are commonly regarded as "over-the-counter medicines" (those which may be dispensed legally without a prescription), but which nonetheless are dispensed pursuant to a prescription.

For purposes of this Directive, a "prescription" includes any order for medicines written or transmitted by any means of communication by a duly licensed and registered physician authorized by the laws of the state to prescribe such medicines and intended to be dispensed by a registered physician or pharmacist.

a. "Prescription Medicines"

For purposes of this Directive, the term "prescription medicines" generally means those medicines which legally may not be dispensed without a prescription under G.L. c. 94C (The Massachusetts Controlled Substances Act) and upon which the manufacturer or distributor has, in compliance with applicable Massachusetts and federal law and regulations, placed the following: "Caution: Federal law prohibits dispensing without a prescription."

Manufacturers' and distributors' sales of prescription medicines to registered physicians, nursing homes, hospitals or other health organizations are exempt under G.L. c. 64H, § 6(l), whether they are dispensed directly by the organizations, or resold. Because such sales are exempt under G.L. c. 64H, § 6(l), to sell prescription medicines tax free a vendor need not accept a resale certificate from such organizations that may resell the prescription medicines to ultimate users. Instead, to substantiate the exempt sale of prescription medicines, the vendor making the sale must maintain adequate records, including appropriate records normally required to substantiate the classification of such substances as prescription medicines, and any other records normally required to be maintained in the dispensing of prescription medicines under G.L. c. 94C.

b. "Over-the-counter Medicines"

For purposes of this Directive, the term "over-the-counter medicines" are those medicines which may be dispensed legally without a prescription under G.L. c. 94C. Sales of over-the-counter medicines for human use generally are taxable. In general, vendors selling over-the-counter medicines must collect sales tax on such medicines, unless the seller accepts a resale certificate in good faith from the purchaser, or unless the purchaser is otherwise exempt and provides the appropriate exemption certificate.

However, the sale of over-the-counter medicines is exempt if such medicines are 1) prescribed by a registered physician, 2) for the treatment of a disease or for direct medication of patients, and 3) dispensed pursuant to such a prescription. See, e.g. Letter Ruling 85-66.

Vendors selling over-the-counter medicines on the prescription of a registered physician must maintain sufficient records demonstrating that the sales qualify for the exemption, including the prescription and other records normally maintained for prescription medicines. See DOR Directive 86-32. Records of prescriptions may be retained either in written form, or recorded by a pharmacist in a data processing system, which is capable of printing the order for the prescription upon lawful request.

3. Registered Physician

Solely for purposes of this Directive, the term "registered physician" includes dentists, podiatrists, certified nurse midwives, nurse practitioners, and any other person duly licensed and registered to prescribe medicines for human use in the course of professional practice.

4. Use Tax on Distribution of Medicine Samples

The Massachusetts use tax G.L. c. 64I, is imposed on the "storage, use or other consumption in the Commonwealth of tangible personal property purchased from any vendor for storage, use, or consumption within the commonwealth at the rate of five percent of the sales price of the property," unless exempt under another provision of law. G.L. c. 64I, § 2. The exemptions found in Chapter 64H, with certain exceptions not relevant here, also apply to the use tax. G.L. c. 64I, § 7.

Distribution by manufacturers of samples of prescription medicines for human consumption to pharmacies, registered physicians, nursing homes, hospitals, and other health service organizations are exempt from sales tax under G.L. c. 64H, § 6(l). Since the exemptions under G.L. c. 64H, § 6(l) also apply to the use tax, neither the sales tax nor the use tax applies to the distribution of samples of prescription medicines. G.L. c. 64I, § 7(b). Use tax does apply, however, to the distribution of samples of over-the-counter medicines and samples of other tangible personal property, not otherwise exempt, which are distributed by manufacturers to physicians, nursing homes, hospitals, and other health service organizations. In such cases, the manufacturer is responsible for remitting the tax to the Commissioner.

/s/Mitchell Adams
Mitchell Adams
Commissioner of Revenue

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