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Letter Ruling 99-15: Radioactive Seed Implant Procedure

September 17, 1999

You request a ruling on behalf of ***** (“the Vendor”) concerning the application of sales and use tax to charges for a radioactive seed implant procedure and sales of a medical product, the radioactive seeds that will be implanted in the patient.

I. Facts

Brachytherapy is a medical procedure in which radioactive seeds are implanted directly into a cancerous tumor. The procedure is used in the treatment of prostate cancer; it allows the delivery of a highly concentrated, yet confined, dose of radiation directly to the site of the cancer. The implanted seeds are rice-sized titanium capsules that contain a radioactive substance. Physicians typically implant from 40 to 100 of these seeds in the patient’s prostate gland, using ultrasound equipment for guidance. The seeds deliver radiation to the site for approximately three months. They are not subsequently removed, as they are compatible with body tissues.

The Vendor charges its customers (hospitals, medical centers or medical practitioners) a procedure fee for each Brachytherapy performed by its customer as well as a separate fee for the purchase of the radioactive seeds themselves. The procedure fee is a contractually agreed upon amount the Vendor charges its customer each time the procedure is performed by the customer or the customer’s employees. The procedure fee includes the cost of training the customer’s medical staff as well as the provision of specified medical equipment and supplies by the Vendor to the customer’s location. Title to the equipment remains with the Vendor; the Vendor’s customer has possession and control of the equipment. The cost for the medical equipment and supplies is not separately stated to the customer. The fair rental value of the medical equipment and the fair retail value of the supplies provided by the Vendor to the customer are more than ten percent of the procedure fee.

II. Discussion

Massachusetts imposes a five percent tax on sales or use of all tangible personal property and telecommunications services either sold or used in the state unless otherwise exempt. A sale includes any transfer of title or possession of tangible personal property, including leases and rentals. Sales for resale are not subject to tax. Generally, sales of personal or professional services that involve inconsequential transfers of tangible personal property for which no separate charges are made are not subject to tax. However, if the sales price of the tangible personal property is separately stated, tax is charged on that component only, regardless of whether the value of the tangible personal property is inconsequential. G.L. c. 64H, §§ 1, 2, 8 and 64I, §§ 1, 2. In this

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context, "inconsequential" is defined as a value of less than ten percent of the total charge. 830 CMR 64H.1.1(1).

G.L. c. 64H, § 6(l) exempts from tax "sales of medicine . . . on prescriptions of registered physicians."^[1] The term medicine (which has no definition in the tax statutes) has generally been construed broadly by the Department so as to include "a substance or preparation used in treating disease; . . . something that affects well-being." Similarly, "on prescription" has been broadly defined by the Department as "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." DOR Directive 91-5. *Also see LR 88-4.*

Lawful sales by manufacturers or distributors of prescription medicines, for human use to 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 seller need not require such organizations to submit a resale certificate. See DOR Directive 91-5.

Sales to any corporation, foundation, organization or institution exempt under Section 501(c)(3) of the federal Internal Revenue Code are also exempt from Massachusetts sales and use tax provided that (1) the tangible personal property or service is used in the conduct of the exempt purposes of the organization; (2) the organization obtains a certificate from the Commissioner stating that it is entitled to the exemption, and (3) the vendor keeps adequate records of the sales including the name of the purchaser, the date of each such separate sale, and the number of the certificate of exemption.

III. Conclusion

The Vendor's charges to hospitals, medical centers or medical practitioners for the radioactive seeds are exempt from sales and use tax pursuant to G.L. c. 64H, § 6(l) as a sale of medicine on prescription by a registered physician.

The Vendor's charges to its customers for the brachytherapy procedure are subject to tax if the value of the medical equipment and supplies provided to the Vendor's customers is more than ten percent of the procedure fee, is not separately stated, and the customer is not otherwise exempt from Massachusetts sales and use tax. You have stated that the fair rental value of the medical equipment and the fair retail value of the supplies provided by the Vendor to the customer are more than ten percent of the procedure fee. The procedure fee is therefore subject to tax. In this situation, the Vendor purchases the equipment and supplies for resale and no tax is due on the Vendor's purchase or use of the equipment in Massachusetts.

Very truly yours,

/s/Frederick A. Laskey

Frederick A. Laskey
Commissioner of Revenue

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^[1] 6(l) also exempts certain specified medical equipment that is not relevant to this ruling, e.g., kidney dialysis machines, life sustaining resuscitators, incubators, heart pacemakers, etc.

