

# STATE OF COLORADO

## DEPARTMENT OF REVENUE

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Bill Ritter, Jr.  
Governor

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PLR-10-004

August 17, 2010

XXXXXXXXXXXXX  
Attn: XXXXXXXXX  
XXXXXXXXXXXXX  
XXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXX,

XXXXXXXXXX ("Company") submitted a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

### Issue

Is the sale of XXXXXXXXXX catheter<sup>1</sup> exempt from Colorado sales and use taxes?

### Conclusion

The sale of XXXXXXXXXX catheter is not exempt from Colorado sales or use taxes. The healthcare provider is the consumer of the device, does not resell the device, for tax purposes, by itemizing the device on a patient's invoice, and is responsible for collecting and reporting the tax.

### Background

Company manufactures the XXXXXXXXXX system, which is comprised of a catheter and a heat generator. The system treats venous reflux disease, which is an underlying cause of varicose veins. The catheter is a single-use catheter that allows for the rapid and uniform ablation of a varicose vein using thermal energy. The catheter consists, in part, of a wire that has a heating element at its tip. The generator produces energy that is transmitted to the catheter's heating element. The catheter also has the ability to transmit information about the temperature of the

<sup>1</sup> The XXXXXXXXXX system is comprised of a catheter and generator. The request for a ruling is limited to the taxability of the catheter.

treated area back to the generator. The treatment shrinks and occludes the varicose vein.

Company sells the device only to licensed healthcare providers. The device is used by the provider at the provider's facilities. After the treatment session is concluded, the catheter is removed from the patient by the provider. The provider may or may not separately state a charge for the catheter in the patient invoice. The catheter and generator each have a retail price greater than \$100.

### **Discussion**

Colorado levies sales and use tax on the sale or use of tangible personal property. §§39-26-104(1)(a) and 202, C.R.S. However, sales and use of certain medical products are exempt. This ruling considers the application of the exemption for therapeutic devices to sale of the catheter.<sup>2</sup>

Colorado exempts from sales and use tax the sale of therapeutic devices under the following circumstances:

(b) When sold in accordance with a written recommendation from a licensed doctor, all sales of therapeutic devices, appliances, or related accessories, with a retail value of more than one hundred dollars, that are sold to correct or treat a human physical disability or surgically created abnormality; and

(c) All sales of therapeutic devices, appliances, or related accessories, with a retail value of one hundred dollars or less, that are sold to correct a human disability or surgically created abnormality.

§39-26-717(b) and (c), C.R.S. Subsection (b) is the only relevant provision because the catheter has a value greater than \$100. However, the exemption under subsection (b) applies only when a patient purchases the device and does not apply when the healthcare provider purchases the device. This limitation is created in the introductory phrase of the statute: the sale must be on the "written recommendation from a licensed doctor." Thus, for example, a patient can purchase tax free such therapeutic devices as apnea monitors and enteral pumps if they are purchased pursuant to a doctor's written recommendation. However, a purchase by a physician of the same therapeutic device is not exempt under this provision.

Therefore, we conclude that the sales of catheters by the Company to healthcare providers are not exempt from sales or use taxes under subsection (b).

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<sup>2</sup> Colorado also exempts the sale of prosthetic devices and materials supplied by a doctor to a patient. See, §39-26-717, C.R.S. The request for ruling does not ask us to consider these exemptions. However, we note in passing and without formally ruling on the issue, that it is unlikely that either of these two exemptions apply to the sale of the catheter. The catheter is not a prosthetic device because it does not replace a body part or function. It is not a medical supply because the patient does not leave the facility with the catheter. See, FYI Sales 68 (Medical Supplies) for more information.

In cases such as this where a service provider uses a product to perform a service, the question sometimes arises whether the service provider can resell the product to the provider's client. A resale moves the incident of taxation from the provider to the client. A resale may also have the effect of eliminating the tax if the client is an exempt entity or the sale to the client qualifies as an exempt sale. For these reasons, a service provider will sometimes separately state a charge on the client's invoice in an effort to characterize the transaction as a resale of the product to the client.

In the present case, a separately stated charge for the catheter on the patient's invoice does not mean that the catheter has been resold by the provider to the patient. We conclude that a separate charge in this case is merely an itemization of the cost components of a service and not a resale of the catheter. The "true object" of the transaction between the healthcare provider and patient is the performance of a service.<sup>3</sup> In making this determination, the department considers a number of factors,

... including whether the lessor [seller] charges a lump sum or separately charges for the operator and rental of the property, whether the lessor [seller] provides the option to rent [purchase] the property without an operator, whether the lessee [purchaser] has obligations normally associated with someone who has a possessory interest in the property (e.g., obligations for risk of loss and insurance), and whether the operation of the property requires special skills not possessed by the lessee [purchaser].

Department General Information Letter 09-029. Although a separate charge is indicative of a sale, we believe that such a conclusion is unwarranted here in light of the other factors we consider. We note, in particular, that the healthcare provider is specially trained to perform this invasive medical procedure and the procedure is typically performed at the provider's facility. The person with the special training is often viewed as the user and consumer of the goods.

In addition to the provider's special training, the patient does not exercise any meaningful control over the catheter. The healthcare provider places the catheter into the patient, operates both the catheter and generator during treatment, and removes the catheter when the treatment is completed. The catheter does not leave with the patient after the treatment.<sup>4</sup> Although it is not necessary that a purchaser

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<sup>3</sup> Compare, Hellerstein, *State Taxation* (WG&L), ¶14.02. Sales for Resale ("Accordingly, if a purchaser of tangible personal property is engaged in selling services, its purchase may be regarded not as the resale of tangible personal property, but rather as the sale of services with merely the incidental transfer of tangible personal property in connection with the rendering of those services."). See also, FYI Sales 68 – Medical and Dental Supplies and Materials, which states, in part, that therapeutic devices generally do not include a single-use device. Moreover, medical goods that used by a doctor to treat a patient and then discarded, are generally taxable. In such cases, the doctor is deemed the user and consumer of such goods.

<sup>4</sup> Although not dispositive, we have generally held that, with respect to the exemption for medical supplies furnished by a physician, a physician is generally considered the user or consumer of

have control of property in order to constitute a sale,<sup>5</sup> the absence of control is indicative of a service transaction.

Moreover, the fact that the system is sold to providers and not patients, that providers are trained to operate the system and patients are not, and that the provider has exclusive control of the catheter, at least suggests that the use of the catheter is inseparably<sup>6</sup> linked to the service provided by the healthcare provider. This close relationship between the service performed by the provider and use of the catheter suggests that the provider's service is the dominant and controlling component of this transaction. We might have a different view of this transaction if Company also sold or leased the system directly to a patient and if the patient could operate the system without employing a healthcare provider.

Finally, our determination is consistent with other similar transactions between a healthcare provider and patient. For example, we view this catheter in the same fashion we view a surgeon's scalpel or other surgical instrument that the surgeon uses to perform a surgery. The surgeon is specially trained to use the scalpel; the supplier sells the scalpel to the surgeon; the patient does not use the scalpel; and the patient does not leave with the scalpel after surgery. The surgeon is the provider of a service and is the consumer of the scalpel. The fact that a surgeon may itemize on the patient's invoice a charge for the cost of the scalpel does not mean that the surgeon has resold the scalpel to the patient.

In sum, these factors describe a transaction for the provision of a service in which the catheter is used and consumed by the healthcare provider, and not a resale of the catheter to the patient. Company is the retailer and must collect sales tax on its sales to healthcare providers, unless the provider is otherwise tax exempt (e.g., a charitable entity).

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medical supplies when such supplies do not leave with the patient. See §39-26-717, C.R.S. and FYI Sales 68.

<sup>5</sup> For example, a drop shipment reseller may never have physical possession of goods provided to the ultimate consumer, but the absence of such possession does not make the reseller a service provider (e.g., a broker). See, Department General Information Letter 09-001.

<sup>6</sup> The issue of separability of services and goods also arises in the context of whether a charge for a service must be included in the calculation of sales tax when the service is part of a sale of taxable goods. See, *A.D. Stores v. Department of Revenue*, 19 P.3d 680 (Colo. 2001). If a service is so inextricably tied to the sale of goods as to be deemed inseparable, then the charge for the service is also taxable. The issue here, however, is somewhat different. Here, the issue is whether the "true object" of the transaction is a service (and, therefore, not a resale of the catheter) or a mixed transaction involving a sale of both a services and a sale of goods. In mixed transactions, tax is calculated on the entire purchase price, unless the service charge is separately stated. See, Hellerstein, *State Taxation* (WG&L), ¶ 17.12 (The Separate Statement Rule); *Dell, Inc. v. Superior Court*, 159 Cal. App. 4th 911, 71 Cal. Rptr. 3d 905, 912 (1st Dist. 2008) (true object test applied only when the sale of services and goods are inseparable (bundled) and not when the transaction is a mix transaction); Department regulation 39-26-102.7(a); Private Letter Ruling 09-004. We conclude that this transaction is a service transaction, not a mixed transaction.

Having concluded that the catheter does not qualify under the therapeutic device exemption because the device is not sold or used by the patient, we do not reach the separate issue of whether the catheter qualifies as a therapeutic device.<sup>7</sup>

### **Miscellaneous**

This ruling applies only to sales and use taxes administered by the Department. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes.

This ruling is premised on the assumption that the Company has completely and accurately disclosed all material facts. The department reserves the right, among others, to independently evaluate Company's representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5

Enclosed is a redacted version of this ruling. You have previously reviewed and stated you have no comment or objection to the redaction.

Sincerely,

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Colorado Department of Revenue  
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<sup>7</sup> In FYI Sales 68, we state that the therapeutic device exemption requires that the product be a mechanical device. A simple catheter is not a mechanical device. However, the department may reach a different conclusion if the catheter has mechanical complexity.