

10-1340
TAX TYPE: REFUND REQUEST—SALES TAX
TAX YEARS: 4-06 through 12-08
DATE SIGNED: 1-25-2013
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER, Petitioner, vs. TAXPAYER SERVICES DIVISION, OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 10-1340</p> <p>Account No. ##### Tax Type: Sales Tax – Refund Request</p> <p>Judge: Marshall</p>
----------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Presiding:

Michael J. Cragun, Commissioner
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER-1, ACCOUNTING FIRM
REPRESENTATIVE FOR TAXPAYER-2, Vice President of
Finance
REPRESENTATIVE FOR TAXPAYER-3, General Account
Manager
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT-1, Taxpayer Services Division
RESPONDENT-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on June 7, 2012, in accordance with Utah Code Ann. §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On or about July 20, 2009, the Taxpayer submitted a refund request in the amount of \$\$\$\$ for the periods April 1, 2006 through December 31, 2008. (Exhibit R-3).

2. The Division refunded \$\$\$\$\$, plus applicable interest, on or about July 21, 2010, for sales tax paid on separately stated shipping and handling charges. (Exhibit R-3).
3. The parties stipulated that the periods of April and May 2006 are beyond the statute of limitations.
4. The remaining issue is the refund request for the June 2006 through December 2008 periods, in the amount of \$\$\$\$\$\$ for sales tax paid on certain items used in the plasmapheresis process.
5. Taxpayer owns and operates plasma collection centers throughout the United States, including in the State of Utah.
6. Taxpayer collects plasma using the plasmapheresis process. During this process, blood is removed from a donor's body, and blood products are separated in a machine called a cell separator. The plasma is captured in a bottle, and the remaining blood products are returned to the donor's body. An anticoagulant, sodium citrate, is added to the bottle as the plasma is collected. The collected plasma is sold to manufacturers who create medications that are transfused and/or injected into patients. (Exhibit P-1).
7. The Taxpayer provided a diagram of the steps involved from procurement to the medications being injected into a patient. The Taxpayer's representative stated that they are only involved in step one. (Exhibit P-2).
8. Taxpayer is seeking a refund of the sales tax paid on the following items: protective cover, pooling bottle, pooling bottle with saline line, bottle box, inserts for the bottle box, and sodium citrate. Invoices and a spreadsheet showing the amounts paid for items were provided to the Division. (Exhibits R-1 and R-2).
9. The Taxpayer argued that the collected plasma is tangible personal property, and that the protective cover, pooling bottles, bottle box, and inserts for the bottle box are exempt from taxation under Utah Code Ann. §59-12-104(22).
10. The Taxpayer argued that the sodium citrate is exempt from taxation under Utah Code Ann. §59-12-104(25) as it is purchased for resale. The Taxpayer maintains that the sodium citrate is a necessary element that ensures the collected plasma is sustained in the desired state during storage and shipping. The Taxpayer's representative stated that the plasma cannot be used if it has coagulated, making it useless to their customers.
11. The Division acknowledges that the containers and packaging may be exempt under Utah Code Ann. §59-12-104(22) if Taxpayer is selling tangible personal property; however

- they argue that the Taxpayer is not selling tangible personal property, but rather is a service provider.
12. It is the Division's position that Taxpayer's activities fall under Utah Code Ann. §26-31-1, which provides that the procurement of plasma for the purpose of injecting or transfusing the same is to be construed as a service, rather than a sale. The Division's representative argued that the product is eventually injected or transfused, and that the statute seems to be so broad, they are not comfortable stating that it does not apply.
 13. The Division provided information from TAXPAYER'S website about the products and therapies that they develop from the collected plasma. (Exhibit R-5).
 14. For the Division, RESPONDENT-1 testified that they would expect a seller of tangible personal property to show their gross sales, and those that should be excluded from tax on their TC-61, Sales and Use Tax Return. She noted that on the Taxpayer's returns for the years at issue, there was not any information entered on the lines for total sales of goods and services, nor on the line for exempt sales. (Exhibit R-4). RESPONDENT-1 stated that while not the determining factor, it resembles the return of a service provider, not a seller of tangible personal property.
 15. It is the Division's position that the sodium citrate, or anticoagulant, added to the plasma is not exempt under Utah Code Ann. §59-12-104(25) because it was not purchased for resale as an ingredient or component part.
 16. The Division's representative asserted that the sodium citrate is incidental to the plasma the Taxpayer is selling, and is not an ingredient or component part.
 17. In rebuttal, the Taxpayer's representative argued that Utah Code Ann. §26-31-1 is not applicable to their process. He stated that Taxpayer is not involved in the process of injecting or transfusing the collected plasma, they collect it only for the purpose of selling it to their customers. He argued that they are procuring the plasma and selling it to companies that would fall under the statute.

APPLICABLE LAW

Utah Code Ann. §59-12-103 imposes sales tax on certain transactions, as follows in pertinent part:

- (1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:
 - (a) Retail sales of tangible personal property made within the state...
 - (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used; or
- (iii) consumed

“Tangible personal property” is defined in Utah Code Ann. §59-12-102(92) as follows:

- (a) “Tangible personal property” means personal property that:
 - (i) may be:
 - (A) seen;
 - (B) weighed;
 - (C) measured;
 - (D) felt; or
 - (E) touched; or
 - (ii) is in any manner perceptible to the senses.
- (b) “Tangible personal property” includes;
 - (i) Electricity;
 - (ii) Water;
 - (iii) Gas;
 - (iv) Steam; or
 - (v) Prewritten computer software.

Certain exemptions on the sales tax imposed on the purchase of tangible personal property provided in Utah Code Ann. §59-12-104, as follows in pertinent part:

- (22) sales of nonreturnable containers...to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property to be sold by that manufacturer, processor, wholesaler, or retailer...
- (25) a product purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compound product.

The time frame in which a taxpayer can request a refund of taxes paid is set forth in Utah Code Ann. §59-1-1410(8), as set forth below:

- (a) Except as provided in Subsection (8)(b) or Section 19-2-124, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:
 - (i) Three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
 - (ii) Two years from the date the tax was paid.
- (b) The commission shall extend the time period for a person to file a claim under Subsection (8)(a) if:
 - (i) The time period described in Subsection (8)(a) has not expired; and
 - (ii) The commission and the person sign a written agreement:
 - (A) Authorizing the extension; and
 - (B) Providing for the length of the extension.

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

CONCLUSIONS OF LAW

The procurement of blood is deemed to be a service, and not a sale. The Utah legislature enacted Utah Code Ann. §26-31-1¹ which provides as follows:

The procurement, processing, distribution, or use of whole human blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing them into the human body together with the process of injecting or transfusing the same shall be construed to be the rendition of a service by every person participating therein and shall not be construed to be a sale.

The Commission first looks to the plain language of Utah Code Ann. §26-31-1.² The statute lists several actions, including the “procurement” of plasma, and that together with the injecting or transfusing of the same is considered to be the rendition of a service “by every person participating therein.” Black’s Law Dictionary defines procurement as, “[t]he act of obtaining, attainment, acquisition, bringing about, effecting”. By including the language “by every person participating therein”, seemingly, the legislature intended for each step of the process to be considered a service, rather than a sale. Taxpayer is involved in step one of the process, the procurement of the plasma.

This specific issue has not been addressed by the Courts in Utah; however Utah Code Ann. §26-31-1 was addressed in *Condos v. Musculoskeletal Transplant Foundation, et al.*, 208 F. Supp. 1226 (D. Utah 2002). The plaintiff sought damages for injuries allegedly caused by bone tissue that had been implanted into him. The plaintiff argued that Utah Code Ann. §26-31-1 recognized that blood was a “product” amenable to strict liability law. The Court noted that no court has ever applied strict liability to the distribution of human tissue, and that the statute “merely shows the legislative intent to keep human blood distribution out of products liability law.” *Id.* At 1229. The Court goes on to note that Utah Code Ann. §26-31-1 “...recognizes that medical transfusions and transplants are essentially medical services, even though a tangible item is involved in the process.” *Id.* At 1230. Other courts who have addressed the issue of whether the procurement of plasma is considered tangible personal property for sales tax purposes have found that the “blood shield” statutes in their respective states deem it to be a service rather than a sale. In *Revenue Cabinet, Commonwealth of Kentucky v. Plasma Alliance*, 794 S.W.2d 639 (Ky. App.

¹ Revised and renumbered, and is currently located at Utah Code Ann. §26-31-201.

² "When interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature." The first step of statutory interpretation is to evaluate the best evidence of legislative intent: "the plain language of the statute itself." *Id.* "When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *Id.* In *the Interest of Z.C., a person under eighteen years of age*, 165 P.3d 1206 (Utah 2007) quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276.

1990) the Court held, “we cannot allow the blood shield statute to be used as a tax-avoidance sword” when the taxpayer in that case argued that the property trying to be taxed was exempt as materials and supplies used in manufacturing, or as containers used in packaging products for resale. Additionally, the Court in *State of Alabama v. Community Blood and Plasma Service, Inc.* (Ala. Civ. App. 1972), held that the Taxpayer was a service provider, and not a seller of tangible personal property that was subject to sales tax.

Taxpayer is not entitled to the sales tax exemptions under Utah Code Ann. §59-12-104(22) and (25). Through the enactment of Utah Code Ann. §26-31-201, the Utah legislature has deemed the “procurement, processing, distribution, or use of a blood product for the purpose of injecting or transfusing the blood product into the human body” a service and not a sale. The two sales tax exemptions claimed by the Taxpayer under Utah Code Ann. §59-12-104(22) and (25), both contemplate a sale. Subsection (22) refers to nonreturnable containers used in packaging the tangible personal property “to be sold”. Subsection (25) is for a product purchased for resale, in either its original form or as an ingredient or component part. As the Taxpayer’s procurement of plasma has been deemed a service, Taxpayer cannot avail itself of the exemptions because there has been no sale. Taxpayer is considered the “consumer” of the products for which the exemption is claimed, and as such, is not entitled to a refund of the sales tax paid.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer’s refund claim for the periods at issue. It is so ordered.

DATED this _____ day of _____, 2013.

R. Bruce Johnson
Commission Chair

D’Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-

302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.