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Code Sections: 4030.12; 4010.01(nn)(3)(G); 4010.01(bbb)(6)

Topic: Sales and Use Tax

Act: 1-2011

Date issued: July 12, 2016

Text

By letter dated November 24, 2015, you requested, on behalf of Merchant, certain rulings in connection with Subtitle D of the Internal Revenue Code of 2011, as amended, (hereinafter, the “Code”) and Act 72 of May 29, 2015, in connection with the Sales and Use Tax (hereinafter, “SUT”) applicable to the services rendered by Merchant. Our opinion is based on the following facts submitted for our consideration.

I. STATEMENTS OF FACTS

Merchant is a privately held corporation organized under the laws of the Commonwealth of Puerto Rico. Merchant is engaged in providing comprehensive pharmacy management and clinical services to various hospitals located in Puerto Rico. Merchant operates within the premises of these hospitals under outsourcing pharmaceutical services agreement with the hospitals (the “Agreement”).

Merchant provides two type of services: prescription drug purchasing related services (“Drug Purchasing Activity”) and pharmacy labor related services (“Pharmacy Services”). These services are billed as Drug fee and Labor fee, respectively.

The Drug Purchasing Activity consist of Merchant’s monitoring the hospital Rx medicine inventory, placing the orders under the hospital’s name with the suppliers and paying for medicine on behalf of the hospital to wholesalers or other direct vendors. The Rx medicines are invoiced directly to the hospital but it is Merchant who is at risk for paying the cost of purchasing the medicines. As part of the Agreement, the hospital reimburses Merchant via a “per patient drug fee”, which is a set fee based in pharmacy adjusted patient day (PAPD), also known as Adjusted Patient Days.

All the drugs administered to the patients are based on prescriptions for dispensing ordered by physicians and includes a prescription order to be dispensed by Merchant’s pharmacy employees. The medicines dispensed by Merchant are mostly prescription medicines that have to be acquired following a physician’s prescription. Merchant may

also dispense over-the-counter (OTC) medicines prescribed by a physician. However, less than 2%, on average, of all purchases of medicines by Merchant to be dispensed are OTC medicines. The PAPD include both OTC medicines and medicines that can only be acquired with a physician's prescription.

The Pharmacy Services consist of providing the licensed pharmacy employees that perform the pharmacy tasks and are responsible for performing on a day to day basis all the usual activities performed by licensed pharmacists, including, but not limited to, maintain dosages and patient profiles; monitor patient medication profiles at the time of dispensing for medication allergies, drug interactions, and duplication; ensure that full and complete pharmacy records and charts are prepared and maintained in compliance with applicable laws, rules and regulations; and keep patient and service records; among others.

II. RULINGS REQUESTED

1. That the operations performed by Merchant, specifically those described as comprehensive pharmacy management and clinical services provided to various hospitals located in Puerto Rico be considered hospital services and thus not taxable.
2. That said transaction should be exempted from SUT pursuant to Sections 4010.01(nn)(3)(A) and (G) and pursuant to Section 4010.01(bbb)(6) of the Code.
3. That Merchant will be deemed in compliance with Subtitle D of the Code with regards to the documentation requirement by obtaining completed and executed Form SC 2916 "Certificate for Exempt Purchases (Tangible Personal Property and Exempt Services)" from every Hospital to which the Company provides the services in order to document the exempt nature of the transaction, pursuant to Section 4030.24 of the Code.
4. That Merchant is deemed in compliance with Subtitle D of the Code by filing the new Special-SUT Monthly Return electronically through the Merchant Integrated Portal (by its Spanish acronym, "PICO"), that shall be filed on or before that twentieth (20th) day of the month following the month in which the transaction exempted for Special- SUT of four (4) percent was effected pursuant to Section 4041.02 of the Code.

III. LAW AND ANALYSIS

A. Drug Purchasing Activity

Section 4020.01(a) of the Code imposes a tax upon every sale transaction of a taxable item in Puerto Rico. Section 4210.01(a) of the Code imposes an additional tax on every sales transaction of a taxable item in Puerto Rico carried out after June 30, 2015. Paragraph (d) of Section 4210.01 of the Code states specifically that for purposes of such

section, there shall be used the definitions established in Subtitle D of the Code. The applicable SUT rate is composed of a base rate of 6% and a surtax rate of 4.5%, for a combined rate of 10.5%, pursuant to Sections 4020.01(b) and 4210.01(b) of the Code. The application of the tax shall be subject to the exemptions granted in Chapter 3 of Subtitle D of the Code. This tax is known as the SUT.

A “taxable item”, which sale is subject to SUT, is defined under Section 4010.01(aa) of the Code as tangible personal property, taxable services, admission rights and mixed transactions. “Mixed transactions” is defined under Section 4010.01(qq) of the Code as the retail sale of two or more tangible personal properties or services, in which the properties or services: (i) are different and identifiable, and (ii) are sold at a single price. However, a transaction that meets the definition of a mixed transaction shall not be considered a mixed transaction if it is a transaction that includes exempt and taxable tangible personal property, in which the purchase price or sales price of the taxable property is immaterial. For these purposes, the term immaterial means that the purchase price or sales price of the taxable personal property does not exceed ten (10) percent of the total sale or purchase price of the mixed tangible personal property. Section 4010.01(qq)(5)(C) of the Code.

Under Chapter 3 of Subtitle D of the Code, Section 4030.12(a) of the Code establishes an exemption for medicines for human consumption that may be acquired only and exclusively by medical prescription (known as “Rx Products”), including the bottles and security caps, labels and bags inherent to the dispensing of prescribed medicines. Therefore, only medicines that may be acquired exclusively by medical prescription are exempt from SUT.

The term “medicine” is defined in Section 4110.01(a)(x) of the Code as “a compound, substance or preparation, and any component of the compound, substance or preparation that are not a “dietary supplement,” “alcoholic beverages,” or “food or food ingredients,” except the food used in enteral feeding: (1) recognized in the United States Pharmacopeia, in the Homeopathic Pharmacopeia of the United States, or in the National Formulary; or (2) destined to be used in the diagnosis, treatment or prevention of illness; or (3) destined to affect the structure or any function of the body.

As represented, the fee charged by the Taxpayer with regards to the Drug Purchasing Activity includes both: medicines that can only be acquired by a prescription and OTC medicines. However, the cost of the OTC medicines is less than 2% of all sales subject to the PAPD. Therefore, the Drug Purchasing Activity may be considered a transaction that meets the definition of a mixed transaction, but nonetheless shall not be considered a mixed transaction since it includes exempt and taxable tangible personal property (i.e. the medicines), in which the purchase price of said taxable property is immaterial, pursuant to Section 4010.01(qq)(5)(C) of the Code. Therefore, the PAPD is considered a fee for the sale of prescription medicines.

B. Pharmacy Services

Section 4210.01(c) of the Code imposes a tax on services rendered to other merchants and designated professional services, as defined in Subtitle D of the Code, carried out after September 30, 2015, at the rate of four (4) percent. Furthermore, paragraph (d) of Section 4210.01 of the Code states specifically that for purposes of such section, there shall be used the definitions established in Subtitle D of the Code.

Section 4010.01(nn) of the Code states the general rule that “taxable services” means any service rendered to any person. However, paragraph (nn)(3)(A) and (G) states that the term “taxable services” shall not include services rendered to other merchants, as defined by Section 4010.01(bbb) of the Code, or health and medical hospital services. Furthermore, Article 4010.01(nn)-1(b)(1)(viii) of the Regulation under the Code states that the term “health services” means services provided by doctors authorized to practice medicine in Puerto Rico and by health professionals with valid licenses issued by the Regulation and Certification of Health Professionals Office under the Department of Health and the Doctor’s Examination Court.

“Services rendered to other merchants”, which are subject to the SUT at the rate of 4%, are defined under Section 4010.01(bbb) of the Code as services rendered to a person engaged in a trade or business or for the production of income, subject to certain exemptions. Health and medical hospital services are exempted from the term “services rendered to other merchants” under paragraph (bbb)(6) of Section 4010.01 of the Code. Article 4210.01(c)-29 of the Regulation under the Code specifically states that health services are exempt even if they are provided directly by corporations or other entities. Therefore, health services are exempt from SUT.

As represented, Merchant provides a series of pharmacy services for which a pharmacist license is required. The services are provided through licensed pharmacy employees. Therefore, the Pharmacy Services provided by Merchant qualify as “health services” and are exempt from SUT.

IV. CONCLUSION

Based solely on the facts, representations, and documents submitted for our consideration, the provisions of the Code and the Regulation issued under the Code, this Department rules that:

1. The Drug Purchasing Activity performed by Merchant under the Agreement shall be considered a sale of prescription medicines for SUT purposes, subject to the SUT exemption provided under Sections 4030.12(a) and 4010.01(qq)(5)(C) of the Code. Therefore, the Drug Purchasing Activity shall be exempt from SUT at the 11.5% and the 4% tax rates.
2. The Pharmacy Services performed by Merchant under the Agreement shall be considered “health services”, pursuant to Article 4010.01(nn)-1(b)(1)(viii) of the Regulation and, therefore, will not be subject to SUT, pursuant to paragraphs

(nn)(3)(G) and (bbb)(6) of Section 4010.01 of the Code. The Pharmacy Services shall be exempt from SUT at the 11.5% and the 4% tax rates.

No opinion is expressed as to the tax treatment of the above transaction under any other provision of the Puerto Rico Internal Revenue Code of 2011, as amended, and the regulations issued thereunder, that may also be applicable thereto, or to the tax treatment of any condition existing at the time of the transaction, or any effect resulting therefrom, that is not specifically covered by this ruling. The opinion expressed shall be valid only upon the continued existence of the facts as submitted to our consideration. This letter ruling is directed only to the Merchant requesting it and may not be used or cited as precedent.

Cordially,

Elisa Vélez-Pérez
Assistant Secretary
Tax Policy Area

