

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

CareAlliance Health Services d/b/a, Roper)
St. Francis Medical Healthcare, Inc.,)
)
Petitioner,)
)
v.)
)
South Carolina Department of Revenue,)
)
Respondent.)
_____)

Docket No.: 12-ALJ-17-0405-CC

ORDER

APPEARANCES: Petitioner: Raymond Carpenter, Esquire, John von Lehe, Jr., Esquire,
and Bryson M. Geer, Esquire
Respondent: Adam N. Marinelli, Esquire, and Lauren Acquaviva,
Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (“ALC” or “the Court”) pursuant to a Request for Contested Case Hearing filed by CareAlliance Health Services d/b/a Roper St. Francis Medical Healthcare, Inc. (“Petitioner”) challenging the final determination of the South Carolina Department of Revenue (“the Department”) denying a refund request for sales and use taxes paid on the purchase of orthopedic and cardiovascular prosthetics and blood derivatives between August 1, 2007, and November 30, 2010. Petitioner is a healthcare corporation consisting of Roper and St. Francis hospitals in Charleston. Petitioner submitted multiple ST-14 forms requesting refunds totaling \$5,014,576.76. The Department refunded approximately \$1.3 million of sales and use taxes. Of the remaining requested refunds, approximately \$3.1 million was predicated on an exemption for “prosthetic devices sold by prescription” under section 12-36-2120(28)(a) of the South Carolina Code (Supp. 2010), and another \$435,000 was based on a purported exemption for “blood derivatives” under section 44-43-10 of the South Carolina Code (Supp. 2010).¹ In a letter dated March 24, 2011, the Department denied Petitioner’s claim for refunds for the prosthetics and the blood derivatives. Petitioner contested the Department’s denial, and the Department’s initial determination was

¹ The actual amount contested is not at issue; here, I merely address the legal issue of whether a refund for the contested items is required under law.

upheld in a Final Determination issued on August 16, 2012. Thereafter, discovery was completed, and both parties filed Cross Motions for Summary Judgment. A motions hearing was held on October 1, 2013, before this Court.

ISSUES

- I. **Whether Petitioner's purchases of prescription prosthetic devices are exempt from sales and use taxes under South Carolina Law?**
- II. **Whether Petitioner's purchases of certain purported blood derivatives are exempt from sales and use taxes under South Carolina law?**

CONCLUSIONS OF FACT

The following facts were undisputed between the parties. The Petitioner is a healthcare corporation comprised of Roper and St. Francis hospitals, both of which are located in Charleston, South Carolina. Petitioner submitted multiple ST-14 forms requesting refunds totaling \$5,014,576.76 for sales and use taxes paid on purchases of medical devices, including bone and joint implants, pacemakers and implantable cardioverter-defibrillators, bone, tissue, blood products, plasma derivatives, and oncology medicines. The Department refunded approximately \$1.3 million of the requested refund and, on March 24, 2011, denied approximately \$3.5 million of the remaining portions of the requested refunds on legal grounds. Thereafter, Petitioner timely contested the Department's decision denying its refund request by letter dated June 20, 2011. Petitioner claims it is entitled to a refund on the contested items because it is exempt from paying sales or use taxes on three types of items: (1) prescription reconstructive musculoskeletal and trauma musculoskeletal prosthetic devices ("Prosthetics A"); (2) prescription cardiac prosthetic devices ("Prosthetics B"); and (3) blood derivatives. The Prosthetics A category includes the following items: reconstructive musculoskeletal devices (hips, knees, shoulders, mastectomy reconstruction implants, other skeletal, other bone, muscle and tissue implants) and trauma musculoskeletal devices (pins, screws, nails, plates, other trauma implants). The Prosthetics B category includes the following items: cardiovascular devices (pacemakers and implantable cardioverter-defibrillators ("ICDs")).

All prosthetic devices in question are FDA regulated class II and class III prescription prosthetic devices. See 21 U.S.C. § 360c(a)(1). The parties agree the Prosthetics A devices, including hips, knees, shoulders, and mastectomy reconstruction implants, replace a missing part of the body. The parties disagree as to whether the remaining Prosthetics A and B devices also replace a missing part of the body.

Additionally, the parties agree Petitioner does not own any inventory of orthopedic or cardiac devices; however, Petitioner purchases and maintains a limited inventory of trauma devices for use on patients treated in the hospital. The parties also agree the reconstructive musculoskeletal devices and cardio devices are distributed to patients in the operating room by a certified physician who issues an oral order to the vendor for the orthopedic or cardiac prosthetic device. The device is immediately implanted into the patient after the physician orders the device.

Last, the parties agree the blood derivatives at issue include the following: Gamunex, Plasbumin, Albumin, Albutein, Buminate, Flexbumin, Octagam, Alburx and Albuminar.

CONCLUSIONS OF LAW

Based upon the submitted briefs, the oral arguments presented, and a thorough examination of the applicable statutes and jurisprudence, I conclude the following as a matter of law:

This Court has jurisdiction to hear this contested case pursuant to section 12-60-30 of the South Carolina Code (Supp. 2013). Generally, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing 2 Am.Jur.2d *Administrative Law* § 360 (1994)). Here, Petitioner requested a contested case hearing and, therefore, has the burden of proof to show by a preponderance of the evidence that the Department's tax assessment was incorrect. See id.; Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding the standard of proof in "administrative hearings is generally a preponderance of the evidence").

This Court's Rules of Procedure provide "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." See Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). In determining whether summary judgment is proper, this Court must construe all ambiguities, conclusions, and inferences arising from the evidence against the

moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Although the evidence and inferences drawn therefrom generally must be construed against the moving party, “the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial.” Rule 56(e), SCRPC.

“If a statute's language is plain, unambiguous, and conveys a clear meaning ‘the rules of statutory interpretation are not needed and the court has no right to impose another meaning.’” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.” Id. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Id.

DISCUSSION

I. Whether Petitioner’s purchases of prescription prosthetic devices are exempt from sales and use taxes under the South Carolina Code?

Under section 12-36-910(A) of the South Carolina Code (Supp. 2012), “[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” Retail sales of tangible personal property includes, among other things:

(i) sales of drugs, *prosthetic devices*,² and other supplies to hospitals, infirmaries, sanitariums, nursing homes, and similar institutions, medical doctors, dentists, optometrists, and veterinarians, if furnished to their patients as a part of the service rendered. These institutions, companies, and professionals are deemed to be the users or consumers of the property.

S.C. Code Ann. § 12-36-110(1)(i) (Supp. 2012) (emphasis added). Pursuant to this code section, the Department promulgated Regulation 117-308 to explain when tangible personal property constitutes taxable retail sales and when tangible personal property is considered part of the services rendered, which are generally not taxable. Regulation 117-308 initially states: “The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services (i.e. accommodation services, communication services).” The regulation then explains

² A “prosthetic device” is defined as “an artificial device to replace a missing part of the body.” S.C. Code Regs. Ann. 117-332.

how it is applied to specific categories of professional and other services. Regarding hospital services, subsection 117-308.8 provides:

Hospitals . . . are not liable for the sales tax with respect to their gross proceeds or receipts from meals, bandages, dressings, drugs, x-ray photographs and other tangible personal property where such property is used in the rendering of the primary medical service to patients.

Where drugs, prosthetic devices and other supplies are furnished to their patients as part of the medical service rendered, such hospitals . . . are deemed to be users or consumers of such drugs, prosthetic devices and other supplies.

Therefore, sales of prosthetics to hospitals are generally taxable sales of tangible personal property.

However, section 12-36-2120 of the South Carolina Code (Supp. 2012) exempts certain retail sales of tangible personal property from sales tax, including “medicine and prosthetic devices *sold by prescription.*” § 12-36-2120(28)(a) (emphasis added). In Home Medical Systems, Inc. v. South Carolina Department of Revenue, the South Carolina Supreme Court determined whether, for tax exemption purposes under section 12-36-2120(28), certain devices were prosthetics and certain products constituted medicines sold by prescription. 382 S.C. 556, 563-64, 677 S.E.2d 582, 586-87 (2009). Although the alleged prescription prosthetic devices and prescription medicines in Home Medical are not the same as the prescription prosthetics at issue here, the supreme court’s analysis of section 12-36-2120(28) is instructive. Id. In Home Medical, the supreme court adopted the Department’s three-part test for determining when the section 12-36-2120(28) exemption applies. Id. The test provides “[1] the sale must require a prescription and [2] the device must actually be sold by prescription and [3] the device must replace a missing part of the body.” Id. (quoting S.C. Rev. Rul. # 03–02 (2003)). Additionally, our case law provides that a tax exemption “must be strictly construed against the claimed exemption.” Home Medical, 382 S.C. at 564, 677 S.E.2d at 587; see also Southeastern–Kusan, Inc. v. S.C. Tax Comm'n, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) (“As a general rule, tax exemption statutes are strictly construed against the taxpayer.”). In this instance, the parties agree the devices are prescription devices, but disagree as to whether the prosthetics were sold by prescription and whether they replace missing body parts. I first address whether the prosthetics at issue were “sold by prescription.”

A. Sold by Prescription

Petitioner contends that because the prosthetic devices at issue are class II and class III federal prescription prosthetics, it would be a violation of federal law if the sale of these prosthetics to the hospital was not a “sale by prescription.” Petitioner specifically points to section 801.109 of Title 21 of the Code of Federal Regulations to argue prescription devices cannot be sold except by prescription. Section 801.109 exempts prescription devices from certain labeling requirements under various specific circumstances,³ including when the device “[i]s to be sold only to or on the prescription or other order of such practitioner for use in the course of his professional practice.” 21 C.F.R. §801.109(a)(2). Therefore, under this labeling regulation, a class II or class III prescription prosthetic can be sold directly to a physician, on the order of the physician, or on prescription of a physician without certain labeling requirements. The regulation suggests a sale *by prescription* is analogous to a sale *to a physician* or *by physician’s order* for the purpose of protecting consumers with labeling requirements because, under all these circumstances, the devices pass through the physician gatekeeper before reaching the consumer.⁴

Thus, I find Petitioner’s argument that any sale of a federal prescription prosthetic is a sale by prescription is incorrect because it is too narrow a reading of section 801.109(a)(2) and dismisses the plain language of the regulation, which presumably incorporates the conjunction “or” for a reason. Therefore, a sale to a hospital is not *de facto* a “sale by prescription.” Because federal law does not require a strict “sale by prescription,” we come to the linchpin of the issue: how does South Carolina define “sale by prescription” for the purposes of tax exemptions? Specifically, does a physician’s verbal order qualify as a “sale by prescription?” Unfortunately, our code does not define prescription in this context. Nor is it appropriate, as the Department urges, for this Court to adopt the definition of prescription in the South Carolina Pharmacy

³ The purpose of the federal classification system is to regulate devices for which “general control by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device” or for which “insufficient information exists to determine that the application of general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device.” 21 U.S.C.A. § 360c(a)(1)(B) & (C). Accordingly, to ensure proper use and safety, prescription devices are subject to certain labeling requirements.

⁴ This interpretation is supported by the affidavit of Mary K. Pendergast, former Deputy Commissioner and Senior Advisor to the Commissioner of the Federal Food and Drug Administration (FDA), who stated federal law requires prescription prosthetics be sold on a physician’s “prescription *or other order*.” (emphasis added). Affidavit of Mary Pendergast at 2.

Practice Act.⁵ See Home Med. Sys., Inc., 382 S.C. at 566 n.7, 677 S.E.2d at 588 n.7 (holding the ALC erred in relying on the definition of medicine for pharmacists found in section 40-43-30(16) of the South Carolina Pharmacy Practice Act to determine whether certain alleged medicines were subject to sales tax). Accordingly, this Court must rely on what guidance is available in case law, the rules of statutory construction, and public policy to determine whether the prescription prosthetics at issue were “sold by prescription.”

1. Definition of Sale by Prescription in South Carolina

The South Carolina Supreme Court’s decision in Home Medical demonstrates the phrases “prescription prosthetic device” and “sold by prescription” are two separate requirements that must be met to apply the exemption under section 12-36-2120(28). 382 S.C. at 563-64, 677 S.E.2d at 586-87. Thus, the supreme court’s holding implies prescription devices can be sold without a prescription under some circumstances, but the supreme court does not describe the circumstances under which a “sale by prescription” occurs.

In the absence of statutory or case law defining a “sale by prescription,” this Court turns to the Department’s interpretation of “sale by prescription” in Revenue Ruling #03-2. This Department ruling addresses whether section 12-36-2120(28)(a) exempts the sale of prescription prosthetic devices to hospitals from sales tax. In its ruling, the Department advised that while certain devices are classified as prescription devices, this does not mean the devices are *sold by prescription*. (citing in support Assoc. Med. Spec., P.A. V. S.C. Tax Comm’n & S.C. Dep’t of Rev., No. 97-UP-447 (S.C. Ct. App. 1997)). The Department further advised that sales of prescription prosthetics to “a hospital, nursing home, or a similar institution or doctor” are retail sales and “are not exempt since such sales do not require a prescription.” Although the Department determined sales of prescription prosthetics to hospitals or doctors are not sales by prescription, the Department did not define, or attempt to define, “sale by prescription” in its ruling.

While this Court generally gives deference to an agency’s interpretation of an applicable statute or its own regulation, this Court is not bound to follow the Department’s interpretation. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); Buist, 367 S.C. at 276, 625 S.E.2d at 640 (“The construction of a statute by the agency charged with its administration

⁵ S.C. Code Ann. §§ 40-43-10 *et seq.*

will be accorded the most respectful consideration and will not be overruled absent compelling reasons.”). Here, I decline to follow the Department’s interpretation of section 12-36-2120(28)(a)’s application to prescription prosthetics sold to hospitals. I find the Department’s failure to define or attempt to define the circumstance under which a prosthetic is “sold by prescription” underscores the fact that the Department’s interpretation is conclusory and without support, particularly because the plain and ordinary meaning of prescription is not clear in the context of the statute. Therefore, it is necessary to engage in statutory construction. See Buist, 367 S.C. at 276, 625 S.E.2d at 640 (“If a statute’s language is plain, unambiguous, and conveys a clear meaning ‘the rules of statutory interpretation are not needed and the court has no right to impose another meaning.’” (quoting Hodges, 341 S.C. at 85, 533 S.E.2d at 581)).

In Webster’s dictionary, “prescription” is defined as “a written direction for the preparation, compounding, and administration of a medicine.” Webster’s Third New International Dictionary 1792 (1993). In the verb form, “to prescribe,” as a physician would, means “to direct, designate, or order the use of as a remedy.” Id. Therefore, generally, a prescription refers to a written direction or order from a physician. Although South Carolina has not addressed the definition of prescription in the context of sales tax exemptions, several other jurisdictions have addressed the matter. And while this Court is not bound to follow the decisions of other jurisdictions, these decisions do provide some guidance on the topic. See Nolan v. Daley, 222 S.C. 407, 412, 73 S.E.2d 449, 451 (1952) (“While this [c]ourt is in no sense bound by the construction of similar [a]cts by the courts of another state, we may well be moved to adopt the construction placed upon such [a]cts by such courts when we are impressed with the logic and reasonableness of their conclusions, especially when, as here, this [c]ourt has not construed same.”).

In Northern Virginia Doctors Hospital Corporation v. Department of Taxation, the Supreme Court of Virginia addressed whether certain medicines and drugs were “sales to the Hospital and thereby subject to a sales tax . . . or whether they are medicines and drugs ‘dispensed by or sold on prescriptions or work order of licensed physician,’ and thereby exempt from the sales tax.”⁶ 193 S.E.2d 684, 685 (1973). The facts of this case were as follows:

⁶ Virginia’s statute exempts “[m]edicines, drugs, crutches, braces, artificial eyes, contact lenses, eyeglasses, hearing aids, prosthetic devices and orthopedic appliances dispensed by or sold on prescriptions or work orders of licensed physicians.” Va. Code Ann. § 58-441.5 (Supp. 1973).

A physician prescribed a drug for a specific patient on a doctor's order sheet. Id. A nurse then transferred the order to a pharmacy requisition form, which was stamped with the patient's plate (including the patient's name, room number, and the prescribing physician's name). Id. The requisition form was then given to the pharmacy, the pharmacy filled the prescription, and the drug was returned to the nursing station for administration to the patient as directed by the physician. Id.

In analyzing this set of facts, the Virginia Supreme Court turned to the definition of "prescription" in Webster's Third New International Dictionary for guidance because the Virginia Code did not include a definition for prescription in the context of tax exemptions. Id. at 688. Applying the dictionary definition to the specific facts of the case, the Virginia Supreme Court found the prescription drugs were exempt from sales tax under Virginia's tax code. Id. The court stated:

We think the General Assembly, in enacting [the sales tax exemption for remedies "dispensed by or sold on prescription or work orders of licensed physicians"], intended to exempt drugs and medicines that are prescribed by a physician to be administered to a patient and which are prepared and compounded by a pharmacist from a written prescription or order."

Id. Furthermore, the court concluded the "order of the physician, whether it takes the form of a prescription or a work order, is the salient feature of the transaction, for without it the pharmacist takes no action." Id.

Similarly, in Syncor International Corporation v. Palmer, the Supreme Court of Appeals of West Virginia determined certain prescription radiopharmaceutical drugs were "dispensed upon prescription," and therefore exempt from sales tax under West Virginia law.⁷ 542 S.E.2d 479, 481 (2001). In this case, Syncor sold prescription radiopharmaceuticals to hospitals, doctors, and other similar health care providers. Id. Some of its sales constituted unit doses of radiopharmaceuticals prepared for a particular patient pursuant to the prescription of the patient's physician.⁸ Id. Specifically, a patient's physician would issue a verbal, facsimile, or electronic prescription to Syncor requesting a particular radiopharmaceutical. Id. at 482. Syncor then

⁷ West Virginia's code exempted from sales tax "sales of drugs dispensed upon prescription." W. Va. Code § 11-15-9(a)(11) (1997). Like Virginia's Code, West Virginia's Code did not define "prescription" in the context of the sales tax exemptions.

⁸ Other sales constituted bulk sales of radiopharmaceuticals to health care providers for subsequent use in preparing unit doses for individual patients. The bulk sales were not contested and deemed subject to sales tax.

produced a prescription label to be attached to the unit dose of the drug. Id. Syncor billed the hospital or clinic for the unit radiopharmaceuticals, and the bills did not always include the patient's name or other patient identifying information. Id. Palmer, West Virginia's tax commissioner, argued the unit sales should be taxed because the sales exemption only applied "when the patient directly buys and self-administers" a drug. Id. The tax commissioner further argued the units were sold to the hospital and not the individual patients. Id. Essentially, the tax commissioner claimed the definition of prescription required the drug to be sold to the patient and self-administered by the patient.

The court rejected the tax commissioner's arguments, and instead found that the issue turned on whether the drugs were "dispensed pursuant to prescriptions". In this instance, the pertinent regulations did not define a "prescription-type sale;" rather, the regulations emphasized the distinction between individual sales pursuant to prescription and bulk sales to medical service providers without prescriptions. Id. at 483-84 n.9. The court concluded:

the sale of a radiopharmaceutical to a medical service provider is exempt from the consumer sales tax under the provisions of West Virginia [law] where the radiopharmaceutical is purchased and dispensed pursuant to a physician's prescription that was prepared for a particular individual patient.

Id. at 483-84.

Further, in Deaconess Medical Center v. Department of Revenue, the Court of Appeals of Washington addressed whether prescription heart-lung machines purchased for a hospital were exempt from sales tax.⁹ 795 P.2d 146 (1990). The court ultimately determined the heart-lung machines were not exempt, primarily because the machines were sold to the hospital, not to individual patients. Id. at 149. In its ruling, the court described the machines as becoming

part of the hospital's surgical equipment, used routinely in all surgical procedures involving the heart and lungs. The machines are not sold to a hospital because they have been prescribed for an individual, and they are not sold to patients at all. Indeed, their use is not "prescribed" in the common medical meaning of the word, let alone prescribed for or dispensed to an individual by any of the practitioners identified.

Id. (citing Webster's Third New International Dictionary 1792 (Merriam 1966)).

⁹ Washington's code provides prosthetic devices are exempt from sales tax when they are "prescribed for an individual" by a licensed physician. Wash. Rev. Code § 82.08.0283 (Supp. 1990).

Irrespective of the final outcome, the commonality between these cases is a recognition that in order to qualify as a sale by prescription for tax exemption purposes, the prescription must be a *written order* prescribing a certain medicine or prosthetic for a *particular patient*. I find this definition of prescription to be reasonable and adopt it for the purposes of this case.

2. Application of the Definition of Prescription to This Case

Applying this definition of prescription to the facts of the case, I conclude the prescription prosthetics at issue were “sold by prescription.” Here, Petitioner’s Director of Material Services, Charles Prescott Ferguson, described in his deposition how the prosthetics are sold to Petitioner. He stated Petitioner’s treating physician contacts the prosthetics vendor a few weeks before the prosthetic will be implanted to let the vendor know what type of product he needs. Ferguson Deposition at 11-15. The day of the operation, the vendor is present in the operating room. Ferguson Deposition at 11-12; Deposition of Melanie Hutcherson at 9-10. During the procedure, the physician orally communicates the patient’s exact needs to the vendor, the vendor selects the appropriate prosthetic, the prosthetic is immediately implanted, and the purchase is made.¹⁰ *Id.* The transaction is memorialized on a requisition sheet, which contains patient-specific information, and, from the requisition sheet a purchase order and invoice are created for accounting purposes. Ferguson Deposition at 33-36; Hutcherson Deposition at 10-11. Thus, it is on the physician’s oral order, memorialized in writing on a requisition sheet, that the prosthetic is purchased by the hospital for a specific patient.¹¹

Under these facts, a physician’s oral order for a specific patient is memorialized in writing and used to purchase the prosthetic from the vendor, which this Court finds constitutes a “sale by prescription.” Furthermore, this Court does not find it determinative that the hospital, and not the patient, pays the bill for the prescription prosthetic; presumably this cost is ultimately passed on to the recipient of the prosthetic, the individual patient.¹²

¹⁰ Additionally, Petitioner’s physician affiants asserted they considered their oral orders to be prescriptions. Affidavit of John McCrosson, M.D. at 1; Affidavit of Brett M. Baker, M.D. at 1.

¹¹ In his affidavit, the Director of Material Services repeatedly stated Petitioner only acquires prescription devices “upon the prescription or order of a physician.”

¹² The exemptions from sales tax under S.C. Code Ann. § 12-36-2120, including the exemption for prosthetic prescription devices, were promulgated pursuant to 1990 Act No. 612, Part II, § 74A. The Act provides no guidance as to the legislative intent for the sales tax exemption for prescription devices.

However, I also find public policy favors the sale of some prescription items in bulk without a prescription. For example, in his affidavit, Steven Silverman, the Director of Compliance of the Center for Devices and Radiological Health at the United States Food and Drug Association, states it would be against public policy to deny hospitals the ability to purchase an inventory of prescription devices when emergency care necessitates utilizing the devices with a quickness that would be defeated by waiting for the manufacturer to fill a prescription. Accordingly, Silverman asserted hospitals may purchase an inventory of prosthetic devices as long as the device is ultimately dispensed to a patient on the prescription or other order of a licensed physician.

Here, although the parties agree Petitioner does not actively keep an inventory of all the prosthetic devices at issue, Petitioner concedes it purchases a small inventory of prescription trauma prosthetics, such as screws, plates, rods, and heart valves, for emergency situations. Petitioner asserts all sales of inventory are made upon the order of a physician even if the orders fail to prescribe the trauma devices for particular persons. Ferguson Affidavit at 2. Under these circumstances, I find it logical to distinguish between a sale related to a particular individual and a bulk sale to a medical provider. Accordingly, bulk sales of prescription devices to medical providers are not “sales by prescription” and are subject to sales tax. See Deaconess Medical Center, 795 P.2d at 149 (holding certain heart-lung machines were not subject to the sales tax exemption for prescription prosthetic devices because they were sold to the hospital and were not prescribed for, or sold to, a particular patient). 382 S.C. at 563-64, 677 S.E.2d at 586-87.

Because I conclude the non-inventory prosthetic devices at issue were sold “by prescription,” I must now address whether the prosthetic devices at issue “replace a missing part of the body.”

B. Replace a Missing Body Part

Home Medical provides that in order for the sales tax exemption to be applicable, the prescription prosthetic “must replace a missing part of the body.” 382 S.C. at 564, 677 S.E.2d at 587. Further, a “device that merely replaces a missing function is not exempt.” Id. In its decision in Home Medical, the supreme court made it clear that although some more modern definitions of prosthetic include the replacement of a missing function, the exemption in section 12-36-2120(28)(a) is limited to prosthetics that replace a missing body part. Id. at 564-65, 677 S.E.2d at 587.

The parties agree that hip, knee, shoulder, and mastectomy reconstructive implants replace a missing part of the body. However, the Department contests whether implanted cardiac devices, some orthopedic devices (other bone, muscle, and tissue implants), and trauma devices (pins, screws, nails, plates) replace a missing part of the body. The Court will address each type of device in turn.

First, the parties dispute whether prescription cardiac implants replace a missing part of the body. Petitioner submitted the deposition of Brett M. Baker, M.D., who regularly implants the pacemakers and ICDs at issue here. Dr. Baker has worked for Petitioner previously. Baker Deposition at 6. Dr. Baker indicated prescription cardiac devices are necessary when cells in the heart die, causing the heart to function abnormally. *Id.* at 9, 12-13, 17. Essentially, prescription cardiac devices do not replace a part of the heart; rather, they replace the function of the dead cells to restore normal heart function.¹³ *Id.* at 17. Accordingly, this Court concludes prescription cardiac devices enhance or correct the functioning of the heart, but do not replace a missing body part. Therefore, prescription cardiac devices are not prosthetics as defined in regulation 117-332 of the South Carolina Code of Regulations, and, therefore, are not subject to the sales tax exemption under the test in Home Medical. 382 S.C. at 564, 677 S.E.2d at 587 (providing that in order for the sales tax exemption to be applicable, the prescription prosthetic “must replace a missing part of the body”).

Second, this Court finds other bone, muscle, and tissue implants replace missing parts of the body just like a man-made hip replacement replaces a human hip that is removed from a patient. The Court finds no reason to distinguish “other bone” from a hip bone or a rib bone, etc. In all these cases, a part of the body is removed and replaced with a prosthetic.

Third, the Court has already determined trauma devices that are purchased in bulk or kept in inventory at the hospital are subject to sales tax because they are not sold by prescription. However, this Court further finds that these devices do not replace a body part, but rather enhance existing body parts.

In sum, this Court finds hip, knee, shoulder, mastectomy reconstructive implants, other bone, muscle, and tissue implants replace missing parts of the body. In contrast, prescription

¹³ Dr. Baker indicated he removes and replaces heart tissue in approximately 1-10% of his patients. Baker Deposition at 16-17. This amount is too small to impact this Court’s determination that cardiac devices do not replace a missing part of the body.

cardiac devices and prescription trauma devices do not replace missing parts of the body and are not prosthetics as defined in section 117-332 of the South Carolina Code of Regulations. S.C. Code Regs. Ann. 117-332 (defining a “prosthetic device” as “an artificial device to replace a missing part of the body”). Because prescription cardiac devices and prescription trauma devices do not replace a missing part of the body, they are not exempt from the sales tax under section 12-36-2120(28)(a). See Home Medical, 382 S.C. at 563-64, 677 S.E.2d at 586-87 (holding that to qualify for a section 12-36-2120(28) exemption “[1] the sale must require a prescription and [2] the device must actually be sold by prescription and [3] the device must replace a missing part of the body” (quoting S.C. Rev. Rul. # 03–02 (2003))).

C. Conclusion

The issue presented is a novel issue, which primarily concerns the application of law. Under the facts presented, I conclude the prescription reconstructive musculoskeletal devices are exempt from sales and use taxes whereas prescription trauma musculoskeletal prosthetic devices and prescription cardiac prosthetic devices are subject to sales and use taxes.¹⁴ I believe my decision is consistent with our case law, which generally requires a tax exemption to be strictly construed against the claimed exemption. Southeastern-Kusan, Inc. v. S.C. Tax Comm'n, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) (“As a general rule, tax exemption statutes are strictly construed against the taxpayer.”). Further, because this was a legal issue, and Respondent has failed to demonstrate a genuine issue as to any material fact to prevent Petitioner from being entitled to judgment as a matter of law regarding the application of the exemption to prescription reconstructive musculoskeletal prosthetic devices, I therefore grant Petitioner’s motion for summary judgment and deny Respondent’s motion for summary judgment as to this issue. See Rule 56(c), SCRPC. Similarly, because Petitioner has failed to demonstrate a genuine issue as to any material fact to prevent Respondent from being entitled to judgment as a matter of law regarding the application of the exemption to prescription cardiac devices, I grant Respondent’s motion for summary judgment and deny Petitioner’s motion for summary judgment as to this issue. See id.

II. Whether Petitioner’s purchases of certain purported blood derivatives are exempt from sales and use taxes under South Carolina law?

¹⁴ Because the devices are not exempt from the sales tax, they are also subject to the use tax. See S.C. Code Ann. §12-36-1310.

South Carolina adopted the Revised Uniform Anatomical Gift Act, otherwise known as the “blood shield law.” See S.C. Code Ann. § 44-43-10 (Supp. 2012). This law provides:

The implied warranties of merchantability and fitness are not applicable to a contract for the sale, procurement, processing, distribution, or use of human tissues including, but not limited to, corneas, bones or organs, whole blood, plasma, blood products, or *blood derivatives*. Human tissue, whole blood, plasma, blood products, and *blood derivatives* must not be considered commodities subject to sale or barter, and the transplanting, injection, transfusion, or other transfer of these substances into the human body are considered a medical service.

Id. (emphasis added). In Samson v. Greenville Hospital System, 297 S.C. 409, 411, 377 S.E.2d 311, 312 (1989), the South Carolina Supreme Court stated the language of the statute “clearly indicates that the Legislature did not intend for blood to be classified as a product.” Moreover, the supreme court further commented that the underlying purpose of the blood shield statute is to “facilitate a readily available supply of blood by limiting liability to defects resulting from negligence.” Id.

Petitioner contends the blood shield statute prohibits the Department from taxing blood derivatives because blood derivatives are considered a service and not tangible personal property subject to the retail sales tax under section 12-36-910(A) of the South Carolina Code. Conversely, the Department contends the blood shield law was not legislated with the intention that it would be applied to tax situations. The Department argues that in absence of the blood shield statute, blood derivatives are taxable tangible personal property.

This Court agrees with the Department. The Court recognizes the Department has inconsistently exempted other human products, like rib cartilage,¹⁵ from sales tax in deference to the blood shield statute; however, since 1992 the Department appears to have adopted the unofficial policy that blood and its derivatives are tangible personal property. See Deposition of John P. McCormack at 41-52. More specifically, the Department seems to have consistently taxed blood derivatives in practice, even if it does not have an official policy governing the taxation of blood derivatives. See id. at 59-64. See Brown, 354 S.C. at 440, 581 S.E.2d at 838 (holding the ALC generally gives deference to an agency's interpretation of an applicable statute or its own regulation unless the plain language of the statute in contrary to the agency's interpretation).

¹⁵ See Affidavit of Christine Buddin.

The blood shield statute, while providing that blood derivatives “must not be considered commodities subject to sale or barter,” but must rather be considered “medical services,” cannot be taken out of context of tort liability and applied to a tax situation. Cf. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) (“All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed *in the light of the intended purpose of the statute.*” (emphasis added)). If the legislature had intended blood derivatives to be exempt from the sales tax, it would have specifically enumerated an exemption for blood derivatives or, at the very least, incorporated the blood shield statute by reference. In the absence of an exemption in the tax code, this Court finds the blood derivatives at issue are retail sales of taxable personal property.¹⁶ Because this Court finds blood derivatives are subject to sales and use taxes as a matter of law,¹⁷ and Petitioner has failed to demonstrate a genuine issue as to any material fact to prevent Respondent from being entitled to judgment as a matter of law. Therefore, I grant Respondent’s motion for summary judgment and deny Petitioner motion for summary judgment as to this issue. See Rule 56(c), SCRPC.

CONCLUSION

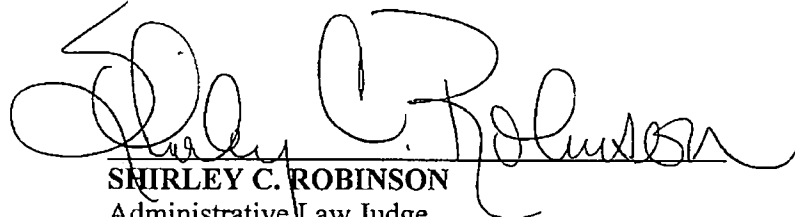
The Department properly denied the portion of Petitioner’s sales tax refund claim related to the purchase of prescription cardiac devices and blood derivatives. However, the Department erred in denying the portion of Petitioner’s sales tax refund claim related to the purchase of prescription reconstructive musculoskeletal prosthetic devices.

THEREFORE, IT IS HEREBY ORDERED that the Department’s Motion for Summary Judgment **IS GRANTED IN PART** and **DENIED IN PART**, and Petitioner’s Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

¹⁶ Because this Court finds blood derivatives are subject to tax as a matter of law, I do not address whether the blood derivatives at issue are manufactured.

¹⁷ Because the devices are not exempt from the sales tax, they are also subject to the use tax. See S.C. Code Ann. § 12-36-1310.

AND IT IS SO ORDERED.

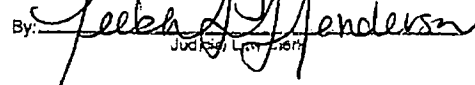

SHIRLEY C. ROBINSON
Administrative Law Judge

May 20, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Intergovernmental Mail Service addressed to the party(ies) or their attorney(s).

This 20 day of May 2014

By: 
Judge, Law Clerk