

STATE OF MICHIGAN



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REVENUE ADMINISTRATIVE BULLETIN 1992-12

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SALES AND USE TAXATION OF PRESCRIPTION DRUGS

(Replaces Revenue Administrative Bulletin 1992-4)

RAB-92-12. This bulletin updates Revenue Administrative Bulletin 1992-4 by extending the effective date of the Treasury Department's position on the sales of oxygen from July 1, 1992, to March 31, 1993.

In all other respects, this bulletin restates the discussion contained in Revenue Administrative Bulletin 1992-4. It announces the Treasury Department's acquiescence in the recent Court of Appeals decision in Syntex Laboratories, Inc. v Michigan Department of Treasury, 188 Mich App 383; 470 NW2d 665 (1991) and describes the refund procedure. For sales of oxygen, the bulletin announces the revocation of Letter Ruling 89-43 and announces a position that will take effect March 31, 1993.

Law

In 1974, article 9, section 8 of the Michigan Constitution was amended by referendum to provide that "[n]o sales tax or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use . . . ."

The General Sales Tax Act provides that no sales tax is due on "[s]ales of prescription drugs for human use . . . ." [MCL 205.54g(1)(a); MSA 7.525(7)(1)(a)] The Use Tax Act contains a similar provision, stating, "[t]he tax levied under this act shall not apply to a purchase of a prescription drug for human use . . . ." [MCL 205.94d(1); MSA 7.555(4d)(1)]

Both the sales and use tax acts define a prescription drug as "insulin or drugs dispensed by a licensed pharmacist to fill individual prescriptions prescribed by a licensed physician or other licensed practitioner of the healing arts solely for the use of a designated person." (See the General Sales Tax Act, MCL 205.54g(2); MSA 7.525(7)(2) and the Use Tax Act, MCL 205.94d(2); MSA 7.555(4d)(2).)

### Discussion of Syntex

The issue before the Court in Syntex was whether the phrase "prescription drugs" appearing in article 9, section 8 of the state constitution included drug samples distributed gratuitously by the taxpayer's sales representatives to licensed physicians in Michigan.

The taxpayer manufactured drugs intended for human use and available to consumers only with a prescription. As part of its marketing plan, the taxpayer provided free samples of its products to Michigan physicians. The Department of Treasury imposed a use tax on these samples because they did not meet the definition of prescription drugs contained in the sales and use tax acts. [MCL 205.54g(2); MSA 7.525(7)(2) and MCL 205.94d(2); MSA 7.555(4d)(2), respectively]

The Court interpreted the constitutional phrase "prescription drugs" by looking to the commonly understood meaning of the words. The Court found that "prescription drugs" are drugs that can be dispensed only as prescribed by a physician. Thus, the determination of whether a drug is a "prescription drug" depends upon its nature. If it is dispensable only pursuant to a prescription, it is a "prescription drug." If it can be lawfully obtained without a prescription, it is not. Because the drugs at issue in Syntex could be lawfully dispensed only pursuant to a physician's prescription, they were "prescription drugs" and exempt from sales or use taxes pursuant to article 9, section 8 of the state constitution.

The Court held that the imposition of sales or use taxes on sample drugs that can be dispensed only as prescribed by a physician is unconstitutional.

### Department Position

Department of Treasury Sales and Use Tax Rule, 1979 AC, R 205.111, states, in pertinent part, that "[s]ales of drugs, medications, instruments, equipment and other tangible personal property to such persons for use in rendering professional services or in connection with their office, laboratory or other similar quarters are taxable." The Treasury Department's acquiescence in the Syntex decision makes this portion of the rule erroneous as it applies to prescription drugs and, to that extent, the rule should not be relied upon.

### Oxygen

Letter Ruling 89-43 describes the effect of Attorney General Opinion No. 5601, dated November 30, 1979, on the taxability of oxygen sold by prescription. The Attorney General ruled that oxygen prescribed by licensed physicians or other licensed practitioners of the healing arts was constitutionally exempt from tax whether purchased from a pharmacist or medical supply house. When drafting its opinion, however, the Attorney General did not have the benefit of the Syntex decision, and the definition therein of a prescription drug as a drug that can be dispensed only pursuant to a prescription.

Because oxygen can be purchased without a prescription, it is not considered a "prescription drug" and any purchase of oxygen is, therefore, not exempt from tax. Thus, a purchase of oxygen, with or without a prescription, will be subject to tax. This position is contrary to that expressed in LR 89-43 and, for that reason, LR 89-43 is revoked. This position is effective March 31, 1993.

### Refunds

The Court held that the constitutional exemption from sales and use tax for "prescription drugs" applied to the taxpayer's use of drug samples in its marketing activities. Therefore, the imposition of the use tax on the plaintiff's use of sample drugs was unconstitutional.

Section 30(2) of the revenue act, MCL 205.30(2); MSA 7.657(30)(2), provides that a taxpayer may petition the Department of Treasury for a refund of tax paid within the time specified by the statute of limitations in section 27a of the revenue act, MCL 205.27a; MSA 7.657(27a). Section 27a(6) provides that a claim for refund based upon a constitutional challenge to the validity of a tax statute must be made within 90 days from the date set for filing the original return.

Therefore, refunds of tax paid on prescription drugs will be honored only when requested within 90 days from the date set for filing the original return and when the tax paid has been refunded to the consumer if actually billed to the consumer.