



MEMORANDUM

CLIENT-MATTER: 096012-0022

TO: Wisconsin Dental Association
FROM: Michael Best & Friedrich LLP
DATE: April 10, 2012
SUBJECT: Dental Sales and Use Tax Issues

INTRODUCTION AND SUMMARY

This memorandum discusses the application of the Wisconsin sales and use tax to dentists. As will be seen below, the basic conclusions are as follows:

- The Wisconsin sales tax generally does not apply to services performed by dentists, and this is true even though a dentist may transfer nominal amounts of materials to patients (such as material for fillings) in connection with the performance of dental services.
- Dentists are subject to sales tax with respect to certain items of tangible personal property (such as toothbrushes) sold by them to their patients and others, absent an exemption. The one major possible exemption is an “occasional sales” exemption, which exempts sales from tax if (1) the gross amounts (total sales price) from the sales of such items are less than \$1,000 during a calendar year, and (2) the dentist does not hold a Wisconsin seller’s permit. Even if the occasional sales exemption applies, the dentist is still required to pay sales or use tax with respect to his or her purchase of the items in question (with the tax base being the dentist’s purchase price for the items). In addition, if the gross receipts (total sales price) from sales equal or exceed \$1,000 in a calendar year, the total gross receipts (going back to the first dollar) become taxable. Again, this is a calendar year test; thus, a dentist that qualifies one year may not qualify in another year, depending on his or her sales volume.
- Dentists are subject to Wisconsin sales or use tax with respect to tangible property and taxable services that they purchase, absent an exemption. One clear category of taxable purchases for which an exemption is not available is office equipment and supplies. In addition, as discussed below, dentists are subject to sales or use tax on many types of materials they use or consume in performing dental services.
- As noted above, a dentist is entitled to make sales pursuant to the \$1,000 occasional sales exemption, but will still be liable for use tax with respect to his or her purchase of the items resold pursuant to the exemption.

The following sections elaborate on these conclusions, and then apply the rules to several specific questions asked by the Wisconsin Dental Association (the “WDA”). For purposes of the

following analysis, it is assumed that the dentist works in a for-profit practice, as opposed to a tax-exempt clinic. If the clinic is tax-exempt, it may be entitled to purchase all items without the payment of sales and use tax. It is also assumed that the patients and customers in question are individuals, who use or consume the products in question. If the customers are not individuals, a different sales and use tax analysis may apply.

DISCUSSION

This section provides (A) a general summary of Wisconsin sales and use tax law, (B) a discussion of how that law applies to *sales* by dentists, and (C) a discussion of how that law applies to *purchases* by dentists.

A. The Law – a General Summary.

Wisconsin imposes a sales tax on retailers based on their gross receipts from the sale of tangible personal property or taxable services at retail, or from the sale, performance or furnishing of certain enumerated services. Retail sales of tangible personal property are presumed subject to sales tax *unless* an exemption applies. On the other hand, sales of services are generally not taxable unless specifically listed in the statutes and even then, a service would not be taxable if an exemption applies. The Wisconsin sales tax rate is 5 percent. However, most Wisconsin counties impose a piggyback sales tax of 0.5 percent,¹ and Wisconsin's two stadium districts impose a piggyback sales tax of 0.1 percent² or 0.5 percent.³ Therefore, the applicable sales tax rate in Wisconsin ranges from 5 to 5.6 percent depending on the location of the sale (the one county in which the 0.5 stadium tax applies does not also have a county tax).

Wisconsin also imposes a "use" tax, generally defined as a tax on the purchaser (at the same rate as the sales tax) for that purchaser's use of taxable property or services in Wisconsin. The purchaser, however, receives a credit for any *sales* tax properly paid on a transaction. Thus, there generally will be only one tax (either a sales or use tax) with respect to any particular transaction. If a transaction is subject to the sales tax, but the seller for whatever reason does not collect it, the purchaser will be liable for the use tax. In that respect, a common adjustment made by the Department of Revenue ("Department") in audits is to assess a taxpayer for use tax on transactions where the seller did not collect the sales tax on an otherwise taxable transaction. Often, these are transactions where the seller is out-of-state and not registered to collect Wisconsin tax with respect to the sale. At present, some dental product suppliers are collecting sales tax, while others are not (if you are unsure, you should check with your specific vendors).

It should also be noted that there is a relationship between the taxability of *sales* by dentists and *purchases* by dentists. Sales or use tax is generally due with respect to the transaction that is the final link in the selling chain. If a taxable item is subject to sales tax when sold by a dentist, the dentist should be able to make his or her original purchase of the item without sales tax (as a purchase for resale, for which a resale certificate is required). If a taxable item is not subject

¹ The following Wisconsin counties do *not* currently impose the 0.5 percent county tax: Brown, Calumet, Kewaunee, Manitowoc, Menominee, Outagamie, Racine, Sheboygan, Waukesha, and Winnebago.

² The 0.1 percent stadium tax applies in Milwaukee, Ozaukee, Racine, Washington, and Waukesha counties.

³ The 0.5 percent stadium tax applies in Brown County.

to sales tax when sold by a dentist (for example, because the sale is exempt as an occasional sale), sales or use tax generally would be due on the dentist's original purchase of the item.

B. Sales by Dentists.

This section identifies (1) non-taxable sales, (2) non-taxable occasional sales, (3) non-taxable incidental transfers, and (4) taxable sales by dentists.

1. Non-Taxable Sales

Charges by dentists for dental services are not subject to sales tax.⁴ Further, charges by dentists for items that are specifically designed for an individual patient and which are installed in the patient's mouth are exempt from sales tax.⁵ Such items include artificial teeth, fillings, bridges, crowns, or inlays, and the parts and accessories for those items.⁶ Drugs furnished by a dentist to a patient for treatment of the patient are also exempt from sales tax.⁷ Beginning October 1, 2009, a "drug" is defined to mean any compound, substance or preparation, or any component of them, that is (i) listed in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, National Formulary, or any supplement to any of the foregoing, (ii) intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease, or (iii) intended to affect a function or structure of the body.⁸ Prior law simply defined drugs (referred to as "medicine") as any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease and which is commonly recognized as a substance or preparation intended for that use. Examples of drugs under the new law include rubbing alcohol, analgesics, antibiotic creams and ointments, antiseptics, gases, hand sanitizers, lip balm, oxygen, prescription medicines, sterile water, and vaccines.⁹ When purchased by dentists, the following items are also exempt "drugs": bone regeneration materials, nitrous oxide, novocaine, and toothpaste.¹⁰ In addition, the Department of Revenue has informally stated that whitening gels are considered "drugs."¹¹ Examples of items that are *not* drugs include alcoholic beverages, soft drinks, distilled water, durable medical equipment, prosthetic devices, mobility-

⁴ Wis. Stat. § 77.52(2); Wis. Admin. Code § Tax 11.18(1). This includes charges for teeth whitening services. See letter from the Wisconsin Department of Revenue to Michael Best & Friedrich LLP dated January 21, 2004 (ruling that such charges are non-taxable).

⁵ Wis. Admin. Code § Tax 11.18(1).

⁶ *Id.*

⁷ Wis. Stat. § 77.54(14)(b).

⁸ Wis. Stat. § 77.51(3pj); Wis. Admin. Code § Tax 11.09.

⁹ *Id.* Also, a listing that contains numerous items and descriptions of items that have been categorized as drugs, durable medical equipment, mobility-enhancing equipment and prosthetic devices can be found in the Streamlined Sales Tax Governing Board, Inc.'s Rules and Procedures, available at [http://www.streamlinedsalestax.org/uploads/downloads/Appendix_M_Health_Care_Items_Addendum_List_2_5_07_\(2\).pdf](http://www.streamlinedsalestax.org/uploads/downloads/Appendix_M_Health_Care_Items_Addendum_List_2_5_07_(2).pdf) (last visited April 10, 2012).

¹⁰ Wis. Admin. Code § Tax 11.18(2)(a)1. The exemption for toothpaste was added by rules effective October 1, 2009 that interpret the Streamlined Sales and Use Tax Agreement (SSUTA), adopted by Wisconsin in 2009. Prior law specifically taxed "cleaning paste," which presumably was toothpaste.

¹¹ The Department provided this informal guidance concerning whitening gels in an April 2, 2012 telephone conference with our legal counsel, Michael Best & Friedrich LLP, after they had advised the Department that South Dakota (which has a similar law) treated them in that fashion.

enhancing equipment and dietary supplements.¹² Although durable medical equipment and prosthetic devices are not exempt as drugs, certain types of durable medical equipment and prosthetic devices are otherwise exempt from sales and use taxes. For example, durable medical equipment is exempt if it is used in a person's home for a human being and prosthetic devices are exempt if placed in or worn on the body to artificially replace a missing portion of the body, to prevent or correct a physical deformity or malfunction, or to support a weak or deformed portion of the body.¹³

2. Exempt Occasional Sales

In addition to services and items identified above, the occasional nature of sales by dentists also provides a limited basis for an exemption from sales tax.¹⁴ An "occasional sale" is one made by a seller who (a) does not hold and is not required to hold a seller's permit,¹⁵ and (b) makes total sales of otherwise taxable property of less than \$1,000 per calendar year.¹⁶ The \$1,000 threshold is a cliff, so that if a seller's cumulative sales of otherwise taxable items equals or exceeds \$1,000 in a given calendar year, all sales (going back to the first \$1) become taxable.¹⁷

It is important to note that if a sale *does* qualify as an occasional sale under this rule, the original purchase by the dentist of the item would be subject to sales tax (despite the fact that purchases for resale would not be taxable if the resales themselves were taxable).¹⁸

3. Non-Taxable Incidental Transfers

Transfers of otherwise taxable property, items or goods that are "incidental" to the performance of a non-taxable service are exempt from sales tax.¹⁹ An "incidental transfer" occurs when the purchaser's main purpose or objective is to obtain the service rather than the item.²⁰ For example, a transfer may be incidental when the item transferred is essential to obtaining the service, does not have any function other than providing the service, has a relatively low value compared with the value of the service, is not subject to the customer's control, is transferred by one with a high level of expertise (indicating that the customer sought the expertise and not the property), and/or is generally regarded by the community and regulatory agencies as incidental to the performance of the services.²¹ On the other hand, a transfer may not be incidental when the item is accounted for separately on the service provider's internal books and records,

¹² *Id.*

¹³ Wis. Stat. § 77.54(22b); Wis. Admin. Code § Tax 11.08. Certain aspects of the definition of durable medical equipment and prosthetic devices were added by the aforementioned emergency rules effective October 1, 2009.

¹⁴ Wis. Stat. § 77.54(7)(a).

¹⁵ Wis. Stat. § 77.51(9)(a). A seller is required to hold a seller's permit when he or she makes sales that are not exempt (e.g., because the sales fail to qualify as occasional sales or are not otherwise exempt as described above). Wis. Stat. § 77.52(7); Wis. Admin. Code § Tax 11.002(2)(a).

¹⁶ Wis. Admin. Code § Tax 11.33(4)(g).

¹⁷ Please note that the \$1,000 threshold applies to the gross amount of the sales, *not* to the amount of tax on the sales. Also, note that sales of non-taxable items are *not* taken into account in making the \$1,000 computation.

¹⁸ *Id.*

¹⁹ Wis. Admin. Code § 11.17(1)(a).

²⁰ Wis. Stat. § 77.51(5).

²¹ *Michael Best & Friedrich LLP, The Complete Guide to Wisconsin Sales and Use Taxes* § 4.6 (2008).

separately invoiced, may be obtained from other sources, may be obtained from the service provider without obtaining the service, and has a high value.²² However, while the *transfer* of an otherwise taxable item may be exempt from sales tax as an incidental transfer, the original *purchase* of the item generally would be subject to sales tax.²³

In our case, a dentist's transfer of taxable gauze or bandages, or fillings material, to a patient during treatment is an incidental transfer that would be exempt from sales tax because the patient's main objective is to obtain the dentist's services (which are non-taxable), not the gauze or bandages. Note, however, that the dentist's original purchases of the gauze or bandages are subject to sales tax.

In contrast, a dentist's sale of a waterpick or Sonicare toothbrush to a patient during the course of treatment is probably not an incidental transfer and would be subject to sales tax because of the property's value and its general commercial availability. Of course, as just discussed, such sales may be non-taxable if made pursuant to the occasional sales exemption (less than \$1,000 in total sales annually) or if some other exemption applies.

4. Taxable Sales

Any other items sold by dentists generally are taxable (unless the occasional sales or some other exemption applies). Examples of such items could include tongue depressors, bandages, toothbrushes, dental floss and cotton.²⁴

C. Purchases by Dentists.

This section identifies (1) non-taxable purchases, (2) non-taxable purchases for resale, and (3) taxable purchases by dentists. Please note that if a purchase is taxable, but sales tax is not remitted to the seller at the time of purchase, the purchaser is required to remit use tax to the Department in an amount equal to the unpaid sales tax.

1. Non-Taxable Purchases

The following purchases by dentists are non-taxable: drugs (as defined above and including nitrous oxide, oxygen, novocaine, toothpaste, and bone regeneration materials²⁵) for the treatment of a human being;²⁶ gold, silver, amalgam and other alloys used to fill teeth; cement and bonding agents used in connection with fillings; and crowns, bridges, bridgework, dentures, inlays, fillings and other items installed by the dentist in a human patient's mouth.²⁷ Such items include braces and other corrective and supporting devices and teeth, mouth and jaw braces and supports.²⁸ Beginning October 1, 2009, purchases of the following also are exempt: bands, brackets, wire, space maintainers, positioners, and other items installed in a patient's mouth to

²² *Id.*

²³ Wis. Stat. §§ 77.52(1) and 77.51(14).

²⁴ Wis. Admin. Code § Tax 11.18(3)(b).

²⁵ Wis. Admin. Code § Tax 11.18(2)(a)1. The exemption for toothpaste was added by the aforementioned rules effective October 1, 2009. Prior law specifically taxed "cleaning paste," which presumably was toothpaste.

²⁶ Wis. Stat. § 77.54(14)(d).

²⁷ Wis. Admin. Code § Tax 11.18(2)(a).

²⁸ Wis. Admin. Code § Tax 11.18(2)(b).

prevent or correct a physical deformity or to support a weak or deformed portion of the body.²⁹ Prior to October 1, 2009, only those braces and other corrective and supportive devices that were individually designed or constructed for a particular patient or that fell into the category of “teeth, mouth and jaw braces and supports that are recognizable as fabricated supports at the time the dentist buys them” were exempt. Please note that, although the purchase and sale of “drugs” (as defined above) are not taxable, the writing of a “prescription” for otherwise taxable materials will not by itself make the materials exempt “drugs.” For example, writing a “prescription” for otherwise taxable materials used to construct braces will not make the materials purchased by the dentist a “drug.”

2. Non-Taxable Purchases for Resale

In addition to the items identified as non-taxable purchases above, a dentist’s purchases of items for resale may also provide a limited basis for an exemption from sales tax. Purchases of items for resale do not constitute “sales at retail” and, therefore, are not subject to sales tax.³⁰ There are at least four important points to make regarding the purchase for resale exclusion from sales tax. First, the exclusion generally requires that the purchaser hold a seller’s permit (unless, for example, the purchaser is a wholesaler or makes only exempt sales).³¹ Second, the subsequent sale of an item originally purchased tax-free for resale does not also qualify for the occasional sales exemption (discussed above) at the time the item is sold.³² Third, if a purchaser claims the resale exclusion and subsequently stores, uses or consumes the property for purposes other than holding the property *solely* for resale, the purchaser may become liable for use tax.³³ Fourth, any item that is purchased and then transferred “incidental” to the performance of non-taxable services (discussed above) is *not* deemed to be purchased for resale; rather, the purchasing dentist is deemed to be the end of the selling chain and will owe sales or use tax with respect to the purchase, unless the item qualifies for an exemption (see also paragraph 3 immediately below).

There may be instances in which a dentist purchases an item for resale *and* pays tax on the original purchase. As long as the dentist does not store, use or consume the item for any purpose other than reselling it, and charges sales tax on his or her resale of the item, the dentist may be able to claim a credit on his or her sales and use tax return equal to the amount of sales tax paid on his or her original purchase. Alternatively, the dentist may be able to submit a buyer’s refund claim to the Department if the amount of the claim exceeds \$50.³⁴

One final note regarding the purchase for resale exclusion from sales tax. Purchasers who claim the resale exclusion may be asked by the seller to provide a completed “Wisconsin Sales and Use Tax Exemption Certificate” (Form S-211).

3. Taxable Purchases

Any other items purchased by dentists are likely to be taxable, including dental equipment, surgical instruments, office equipment, office supplies and consumable supplies used by a

²⁹ Wis. Admin. Code § Tax 11.18(2)(a)4.

³⁰ Wis. Stat. §§ 77.51(13rm) and 77.52(1).

³¹ Wis. Admin. Code § Tax 11.14(6).

³² Wis. Admin. Code § Tax 11.33(4)(g).

³³ Wis. Stat. §§ 77.52(13) and 77.53(1b).

³⁴ Wis. Stat. § 77.59(4)(a).

dentist to conduct his or her business.³⁵ Such items include tongue depressors, bandages, toothbrushes, dental floss and cotton.³⁶ Further, purchases by a dentist who makes occasional sales of otherwise taxable items (on which the dentist would not ordinarily need to charge sales tax) are subject to sales tax upon the dentist's purchase.

WDA QUESTIONS & ANSWERS

This section briefly answers nine specific questions presented by the WDA regarding the taxability of different types of transactions involving dentists. The questions and answers also help illustrate some of the above discussion.

A. Question & Answer # 1

Question: If a dentist buys a Sonicare toothbrush for \$50, pays sales tax on the purchase, and resells the product for \$60, what is the taxable amount the dentist charges a patient?

Answer: It depends on whether the occasional sales exemption applies. If it does, the dentist's *sale* of the toothbrush would be non-taxable, in which case the taxable amount would be \$0 (since the dentist paid tax on his or her original purchase of the toothbrush). If the sale does not qualify as an occasional sale, the taxable amount would be \$60 *and* the dentist would be entitled to a credit or refund in the amount of the tax he or she paid on the purchase.

B. Question & Answer # 2

Question: If a dentist buys a Sonicare toothbrush for \$50, does *not* pay sales tax on the purchase, and resells the product for \$60, what is the taxable amount the dentist charges a patient?

Answer: Again, it depends on whether the occasional sales exemption applies. If the exemption does not apply, the taxable amount is \$60 because sales of toothbrushes are taxable and \$60 is the selling price. If the exemption does apply, the taxable amount with respect to the sale to the customer would of course be \$0, but the dentist would owe use tax with respect to the \$50 the dentist paid for the toothbrush.

C. Question & Answer # 3

Question: If a dentist writes a prescription for a waterpick or Sonicare toothbrush, and only sells it to a patient, is the sale exempt from sales tax due to the fact that it is made pursuant to a prescription?

Answer: The sale may be exempt from sales tax if it qualifies as an occasional sale; however, in such a case, the dentist's original purchase of the waterpicks or toothbrushes would have been taxable. For sales tax purposes, the existence of a prescription is relevant only if the sale involves drugs as defined above. The toothbrush does not qualify under this exemption.

³⁵ Wis. Admin. Code § Tax 11.18(3).

³⁶ Wis. Admin. Code § Tax 11.18(3)(b).

D. Question & Answer # 4

Question: If a dentist writes a prescription and sells a product or medicament that can be considered a drug, is the sale exempt from sales tax?

Answer: Yes, *but only if* the product or medicament falls within the definition of “drugs” or qualifies for the occasional sales exemption, both of which are described above. The sale of drugs is generally exempt from sales tax if furnished by a dentist to a patient for treatment of the patient. Again, please note that the writing of a “prescription” for an item will not *by itself* make the item an exempt “drug”; rather, the item must qualify as a drug under the definition discussed above. If the sale was exempt from sales tax as an occasional sale (because the product or medicament did not fall within the definition of “drug”), the dentist’s original purchase of the product or medicament would be subject to sales tax.

E. Question & Answer # 5

Question: If a dentist buys whitening to use for in-office whitening on patients (i.e., zoom whitening, done while the patient is in the dental chair), is that taxable - to dentist or patient or both?

Answer: The charge to the patient for the whitening service (inclusive of the whitening agent) is not taxable. The dentist’s purchase of the whitening gel is non-taxable, as the Department of Revenue considers whitening gels to be “drugs.”

F. Question & Answer # 6

Question: If a dentist buys whitening for patients to use at home after the dentist has taken the impressions and fabricated the patient-specific whitening trays and cleared the patient for at-home whitening process, is the sale of that service to the patient (and the at-home whitening materials that go with it) taxable to the dentist - or to the patient - or both?

Answer: The charge to the patient for the whitening service (inclusive of the whitening agent) would not be taxable. The dentist’s purchase of the whitening gels is not taxable.

G. Question & Answer # 7

Question: If a dentist buys whitening syringes (gels) so patients can purchase them from the practice to take home and use as refills (but did not have chairside instruction that same day since they had it previously), is that sale taxable (to dentist or to patient - or both?).

Answer: As noted above, the Department of Revenue considers whitening gels to be “drugs.” Thus, they are exempt when sold *to* a dentist for treatment of a patient, and are exempt when sold *by* a dentist for treatment of the patient.

H. Question & Answer # 8

Question: If a dentist buys and resells whitening products (Crest whitening strips that are equivalent to over-the-counter products that can be purchased at a pharmacy) and that do not include a patient-specific whitening tray for patients to take home and do home whitening are those products taxable to the dentist or patient or both?

Answer: If the occasional sales exemption discussed above applies, the sale to the patient would be non-taxable, but the dentist would owe sales or use tax on the purchase of the whitening strips and trays. If the occasional sales exemption does not apply, the purchase by the dentist would be non-taxable, as a purchase for resale, and the dentist should provide the vendor with a Wisconsin resale certificate. The sale by the dentist would be taxable. See the letter from the Wisconsin Department of Revenue to Michael Best & Friedrich LLP dated January 21, 2004 (specifically, footnote 1 of that letter).

I. Question & Answer # 9

Question: Would the answer to #8 vary if the whitening strips sold by the dentist were a stronger dosage of bleach which required a dentist's prescription in order to obtain (not over-the-counter)?

Answer: Our legal counsel has informed us that, while not entirely free from doubt, high-concentration whitening strips under this fact pattern probably would be (a) exempt when purchased by a dentist, and (b) exempt when sold by a dentist. There are two key tax issues. The first is whether these high concentration whitening strips, which cannot be sold over the counter, are a "drug." The second is whether they are "for treatment of a patient." We assume that the answer to the second question is "yes" – that is, the high concentration strips are sold only to patients of record, and there is some supervision and instruction provided by the dentist in connection with the use of the strips. As to the question of whether they are "drugs," when not available over the counter, they are arguably analogous to whitening gels, which the Department does consider to be "drugs."