



STATE OF ARKANSAS
**Department of Finance
and Administration**

REVENUE LEGAL COUNSEL

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September 3, 2020

[REDACTED]

RE: Sales Tax - Sale involving transfer of human tissue
Opinion No. 20200725

Dear [REDACTED]:

I am writing in response to your July 13, 2020 request for a revenue legal opinion:

I am requesting a legal opinion concerning a new vendor we are using. ... The company provides us with a medicated amniotic tissue for use in the eye. It is used to treat certain eye infections.

Could you please let me know if it would be a sales or use tax?

During our subsequent phone conversation, you identified the product as the [REDACTED] marketed by [REDACTED]. You explained that the clinic must keep the product refrigerated. You explained that the product is similar to a contact lens, and the physician applies the product to the patient's eye to cover an infection and help the eye heal faster.

On July 30, 2020, you provided additional information by email. You stated that the vendor's representative stated that the lens is a prescription. You also provided a video presentation by the vendor that demonstrates how to use the product.

RESPONSE

The transportation, implantation, processing, preservation, quality control, and storage of human tissue is not a taxable service in Arkansas. Federal law generally prohibits the sale of human tissue through interstate commerce.

Discussion

The Arkansas Gross Receipts (Sales) Tax is generally applicable to the sale of tangible personal property and certain enumerated services. Ark. Code Ann. § 26-52-301 (Supp. 2019). The tax is computed based on the total value of consideration paid for the taxable property or service. *Id.*; *see also* Ark. Code Ann. § 26-52-103(19) (Supp. 2019). When a sale of tangible personal property or the performance of such an enumerated service occurs in Arkansas, a taxable transaction occurs,

and the tax should be collected and remitted. Arkansas Gross Receipts Tax Rule GR-5. A “sale” means any transaction resulting in the transfer of either the title or possession, for ... valuable consideration, of tangible personal property or taxable services regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. Arkansas Gross Receipts Tax Rule GR-3(M)(1).

Arkansas Compensating (Use) Tax is due on the purchase of any tangible personal property that is purchased out of state and brought into Arkansas for use, storage, consumption, or distribution. Ark. Code Ann. § 26-53-106 (Supp. 2019). “Use,” with respect to tangible personal property, means the exercise of any right or power over tangible personal property incident to the ownership or control of that tangible personal property. Ark. Code Ann. § 26-53-102(30)(A) (Supp. 2019). The compensating use tax is assessed when the transportation of the property has come to rest or when the property has become commingled with the general mass of property in the state. Ark. Code Ann. § 26-53-106(b) (Supp. 2019); *see also Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 401-02, 730 S.W.2d 483, 485 (1987). Once the transportation has ceased or the property is commingled, the property is no longer in the stream of interstate commerce and is subject to the compensating use tax. *See Martin*, 292 Ark. at 402, 730 S.W.2d at 485; *see also Skelton v. Federal Express Corp.*, 259 Ark. 127, 131, 531 S.W.2d 941, 94 (1976). There is a presumption that tangible personal property shipped, mailed, expressed, transported, or brought to this state by a purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state. Ark. Code Ann. § 26-53-106(d)(2) (Supp. 2019).

Under the National Organ Transplant Act (NOTA), it is unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. 42 U.S.C. § 274e(a). “Human organ” means “the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.” *Id.* at § 274e(c)(1).¹ “Valuable consideration” does not include reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ. *Id.* at § 274e(c)(2). The NOTA does not define the term “human transplantation.” Webster’s New World Dictionary, Third Collegiate Edition, defines the term “transplant” as “to transfer (tissue or an organ) from one individual or part of the body to another; graft.”

The product insert for the [REDACTED], available at [REDACTED], last visited on August 6, 2020, includes the following description:

¹ *See also* 42 C.F.R. 121.13 (“Human organ, as covered by section 301 of the National Organ Transplant Act of 1984, as amended, means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, skin, intestine (including the esophagus, stomach, small and/or large intestine, or any portion of the gastrointestinal tract) or any vascularized composite allograft defined in § 121.2. It also means any subpart thereof, including that derived from a fetus.”).

██████████ is a self-retaining biologic corneal bandage. It is comprised of a cryopreserved amniotic membrane graft fastened to an ophthalmic conformer. This product is aseptically processed from tissues obtained from donated human tissue (placentas) according to current Good Tissue Practices (cGTP) and Good Manufacturing Practices (cGMP) regulations established by the US Food & Drug Administration (FDA). ██████████ is a Class II medical device cleared by the FDA. ...

This tissue has been deemed eligible for transplantation based on acceptable screening, serological and microbial test results.

According to the product insert, the ██████████ has the following indications:

- ██████████ is intended for use in eyes in which ocular surface cells are damaged or underlying stroma is inflamed or scarred and suited for patient comfort. Acting as a self-retaining biologic corneal bandage, ██████████ effectively treats superficial corneal surface diseases by suppressing inflammation and related pain, promoting epithelial healing, and avoiding haze.
- ██████████ is inserted between the eyeball and the eyelid to maintain space in the orbital cavity and to prevent closure or adhesions. Placement of the conformer also enables application of the cryopreserved amniotic membrane to the ocular surface without the need for sutures.
- ██████████ is for single-use only in one patient by an ophthalmologist or optometrist.

Finally, the product insert provides, under the heading “Donor Eligibility and Summary of Records”:

- This tissue has been deemed eligible for transplantation based on acceptable screening, serological and microbial test results.
- A Certificate of Compliance regarding the manufacturing, storage, shipping and tracking controls for Bio-Tissue, Inc. products is available upon request.

Because the ██████████ is “processed from tissues obtained from donated human tissue (placentas),” it satisfies the definition of “human organ” under the NOTA. *See* 42 U.S.C. § 274e(c)(1). Because the ██████████ is a “cryopreserved amniotic membrane graft” that the physician inserts between the human eyeball and the human eyelid, its use is for human

transplantation. *See id.* at § 274e(a). Therefore, under the facts that you have provided, it appears that the NOTA would prohibit any person from knowingly acquiring, receiving, or otherwise transferring the [REDACTED] for valuable consideration for use in human transplantation if the transfer affected interstate commerce. *See id.*

A vendor may impose a reasonable charge for the removal, transportation, implantation, processing, preservation, quality control, and storage of the human tissue. *See id.* The removal, transportation, implantation, processing, preservation, quality control, and storage of human tissue is not a specified taxable service in Arkansas. Under the facts that you have provided, if the vendor charges a fee exclusively for the transportation, implantation, processing, preservation, quality control, or storage of the [REDACTED], the payment of that fee would not be a taxable sale for purposes of the Arkansas gross receipts tax or compensating use tax.

I have based this opinion on my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. Only the requestor may rely on this opinion, and, pursuant to Arkansas Gross Receipts Tax Rule GR-75(B), this opinion only will be binding on the Department for three (3) years from the date of issuance.

A copy of the Arkansas Gross Receipts Tax Rules referenced in this letter is available online at http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

Sincerely,

Brad Young, Attorney
Revenue Legal Counsel