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June 18, 2010

[G], Ph.D.
President and CEO
[C]
XXXX --- ---
--- ---, - XXXXX

Re: Tax Opinion Request 10-125
[C]

Dear Dr. [G]:

This is in response to your March 31, 2010, letter in which you request information as to the proper application of the Sales and Use Tax Law to certain transactions involving members of the [C].

You state:

On behalf of the [C], whose more than 250 members include our state's premier life sciences companies and academic research institutions, I would like to thank you for taking the time to meet with us to discuss the conflicting information and guidance related to the exemption provided by California Revenue & Taxation Code (CRTC) Section 33.

[¶] . . . [¶]

We request that the State Board of Equalization's Legal Department issue a revised legal opinion regarding the definitions of "bank," "human body parts," and "medical purposes" as set forth in California Revenue and Taxation Code § 33. In addition, we respectfully request that Annotation 495.0050 Blood and Tissue Banks be retroactively rescinded.

DISCUSSION

Your letter asks us to resolve a conflict that you believe exists between two legal opinions analyzing the application of Revenue and Taxation Code section 33 (Section 33) and to provide definitions of certain terms used in this section. I will begin by providing a brief discussion of the Sales and Use Tax Law. I will then discuss previous opinions written by the Legal Department discussing Section 33. Finally, I will address your concerns.

California imposes a sales tax measured by a retailer's gross receipts from the retail sale of tangible personal property inside this state, unless the sale is specifically exempted from taxation by statute. (Rev. & Tax. Code, §§ 6051, 6091.) The sales tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700.) When sales tax does not apply, use tax is imposed, measured by the sales price of property purchased from a retailer for the storage, use, or other consumption of the property in California, unless specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code, §§ 6201, 6401.) The use tax is imposed on the person actually storing, using, or otherwise consuming the property. (Rev. & Tax. Code, § 6202.) Taxable gross receipts or sales price includes all amounts received with respect to the sale, with no deduction for the cost of the materials, service, or expense of the retailer passed on to the purchaser, unless there is specific statutory exclusion. (Rev. & Tax. Code, §§ 6011, 6012.)

Section 33 appears in the general section of the Revenue and Taxation Code prior to the start of the property tax sections (Rev. & Tax. Code, § 50 et seq.). It states:

Human whole blood, plasma, blood products, and blood derivatives, or any human body parts held in a bank for medical purposes, shall be exempt from taxation for any purpose.

Sales and Use Tax Annotation¹ (Annotation) 495.0045 (9/29/71) addresses the transfer of blood by a blood bank and states that "the blood bank is not a 'seller' within the meaning of section 6014 since the sale of blood is not a sale of property 'of a kind the gross receipts from the retail sale of which are required to be included in the measure of sales tax.'" The back-up letter to the annotation states that the sales of blood "are exempt under section 33 of the code, which exempts blood from taxation for any purpose."

Annotation 495.0050 (1/20/06), which you request be rescinded, discusses the application of tax to sales made by blood and tissue banks, and states:

Any available exemption for sales of human body parts under Revenue and Taxation Code section 33 applies only to the transfer of blood products or human body parts held by a "bank." If the transferor does not qualify as a "bank" for the purposes of section 33, no exemption is available. A "bank," for the purposes of section 33, is an organization that processes, stores, and distributes in a not-for-profit transaction blood products or human body parts pursuant to statute. Organizations that prepare property derived from human bodies for commercial sale do not qualify as "banks" within the meaning of section 33.

The back-up letter of Annotation 495.0050 (1/20/96) is also the back-up letter for Annotation 540.0315 (1/20/06), which states:

¹ Annotations are summaries of the conclusions reached in selected opinions of attorneys of the Board's Legal Department and are intended to provide guidance regarding the interpretation of Board statutes and regulations as applied by staff to specific factual situations. (See Cal. Code Regs., tit. 18, § 5700.)

Revenue and Taxation Code section 33 specifies that “human whole blood, plasma, blood products, and blood derivatives, or any human body parts held in a bank for medical purposes, shall be exempt from taxation for any purpose.” Human body part derivatives, such as proteins and enzymes, are not “human body parts” within the meaning of Revenue and Taxation Code section 33. Furthermore, the exemption from sales and use tax provided in section 33 applies only to blood products and human body parts “held in a bank for medical purposes. . . .” (Emphasis added.) If the transferor does not qualify as a “bank” for the purposes of section 33, no exemption is available.

For purposes of section 33, a “bank” is an organization that processes, stores, and distributes in a not-for-profit transaction blood products or human body parts pursuant to statute. Organizations that prepare property derived from human bodies for commercial sale do not qualify as “banks” within the meaning of section 33.

The back-up letter concludes that to be a “bank” under Section 33, a facility must also possess a valid license as required by applicable law.

Finally, Annotation 395.0673.250 (8/29/96) discusses whether certain sales made by a *medical laboratory* qualify as occasional sales under Revenue and Taxation Code, section 6006.5. The medical laboratory was in the business of analyzing medical samples and providing reports to its clients.² One sale made by the laboratory was a sale of human blood to *another laboratory*. The annotation states that sales of property of a type which would never be subject to tax at retail are not counted for the purpose of determining if a seller has made sufficient sales to require the holding of a seller’s permit. Citing Section 33, the annotation states that sales of human blood fall within this category of sales and, accordingly, does not count the sale of blood in determining whether the laboratory was required to hold a seller’s permit.

Before addressing your concerns, we note that these annotations provide conflicting guidance concerning Section 33’s exemption for sales of blood products. With respect to sales of blood and blood products, Annotations 495.0050 (1/20/06) and 540.0315 (1/20/06) limit the exemption found in Section 33 to transactions in which the transferor is a blood bank. While Annotation 495.0045 (9/29/71) concludes that a blood bank is not required to hold a seller’s permit solely by reason of its sales of blood, the legal analysis found in its back-up letter does not appear to be limited to blood banks. The annotation states that the sale of blood is not a sale of property of a kind of which the gross receipts from the retail sales of which are required to be included in the measure of tax. Finally, Annotation 395.0673.250 (8/29/96) concludes that the sale of blood is the sale of property of a type which would never be subject to tax, even when the sale is made by an entity other than a licensed blood bank.

Based on the language, punctuation, and structure of Section 33, we agree with the analysis found in Annotation 395.0673.250 (8/29/96) and conclude that Section 33 exempts from taxation:

² As will be discussed later, these types of activities do not require licensing as a “blood bank” under California law. (See Cal. Code Regs., tit. 17, § 997, subd. (a).)

1. Human whole blood.
2. Plasma.
3. Blood products.
4. Blood derivatives.
5. Any human body parts held in a bank for medical purposes.

Section 33's requirements that property be held in a bank for medical purposes applies only to human body parts and does not apply to human whole blood, plasma, blood products, or blood derivatives.

This analysis is consistent with the legislative history. Howard Thelin, the author of Assembly Bill 345, which added Section 33 to the Revenue and Taxation Code, wrote to Governor Pat Brown on June 16, 1965, requesting approval of the bill. In this letter, he described the reason for the bill:

The reason for the bill is that historically and traditionally human blood and blood derivatives have been treated as part of the human body and have been exempt from taxation. The State of California has already recognized this and these products are now exempt from the sales tax and have been for many years under an administration ruling of the Board of Equalization. However, recently Los Angeles County has been taxing blood as personal property.

There is no indication in this language of any intent to limit the exemption for human blood and blood derivatives to those held in a licensed blood bank.

The Offices of the County Counsel of Los Angeles County wrote a letter to Governor Brown on June 15, 1965, requesting that he veto Assembly Bill 345. The letter indicated that the bill would "exempt that portion of business inventory of commercial laboratories and drug wholesalers consisting of blood products from property taxation." Furthermore, because Red Cross blood banks and other non-profit organizations perform public services, they are already exempt from taxation. The Offices of the County Counsel of Los Angeles believed the "only beneficiaries of [Assembly Bill 345] would be such business concerns as Cortland Laboratories, Inc. and Hyland Laboratories, Inc. . . ."

At the time Assembly Bill 345 was signed into law, Los Angeles County, whose taxing of blood as personal property was the impetus for the legislation, understood Revenue and Taxation Code section 33 as applying to blood products in commercial laboratories and not just those in licensed blood banks. The language of the statute and the understanding of parties in both support and opposition of its enabling legislation are consistent with our above analysis of Section 33. Accordingly, as discussed more fully below, we will take action to delete annotations inconsistent with our opinion herein.

In your letter, you express concern with a January 20, 2006, opinion letter's (hereafter 2006 letter) analysis of the meaning of the terms "human body parts" and "bank" as they are used in Section 33. You additionally ask that we provide a definition of these terms, along with the term "medical purposes," for purposes of Section 33. I will address each of these terms separately.

Human Body Parts

In discussing the meaning of human body parts, the 2006 letter cites the Uniform Anatomical Gift Act, which has since been repealed and replaced effective January 1, 2008.³ (Stats. 2007, ch. 629). The 2006 letter notes that “part,” as defined at the time, was “an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body or a pacemaker.” (former Health & Saf. Code, § 7150.1, subd. (g).)

The 2006 letter then cites Health and Safety Code section 7054.4, which addresses disposal of “recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use.” It then states that the separate reference to “recognizable anatomical parts” and “human tissues” in Health and Safety Code section 7054.4 is a strong indication that the Legislature views these two items as separate and distinct. The 2006 letter concludes that tissue is not a “human body part” as that term is used in Section 33 and that human body part derivatives and proteins are not “human body parts” under Section 33, though they may qualify as “tissues” that may be held in a licensed tissue bank. (See Health & Saf. Code, § 1635, subd. (c).)

You state in your opinion request that the discussion of human body parts in the 2006 letter is inconsistent with a written opinion of the legal department issued January 14, 2005 (hereafter 2005 letter). We have reviewed previous opinions of the Legal Department, including the 2005 letter. The 2005 letter discusses the application of tax to purchases of human tissue by biotechnology and pharmaceutical companies. The tissue was to be used for medical research. The 2005 letter states that human tissue *is* a “human body part” under Section 33. After assuming that the purchasers were involved in research that uses human tissue for medical purposes, the letter concludes that the sales of tissues to these companies are not subject to tax under Section 33.

Furthermore, the back-up letter for Annotation 425.0417 (6/15/93), which concludes that certain sales of semen are exempt from tax, reveals that the annotation is based on the conclusion that the term “body parts” in Section 33 is broad and *includes* human tissue.

The 2005 letter and the annotation back-up letter are in direct conflict with the 2006 letter over whether human tissue is included definition of “human body parts” under Section 33. We conclude that the 2005 letter is correct in its position that human tissue is a “human body part” under Section 33.

Under the Uniform Anatomical Gift Act, Health and Safety Code section 7150.10 (which replaced former Health and Safety Code section 7150.1) defines “part” as “an organ, an eye, or tissue of a human being.” (Health & Saf. Code, § 7150.10, subd. (a)(18).) For purposes of this act, tissue is defined as “a portion the human body other than an organ or an eye[,]” but it only includes blood under certain circumstances. (*Id.* subd. (a)(30).) Combining the two definitions

³ The Uniform Anatomical Gift Act provides that an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education. (Health and Saf. Code, § 7150.15.) The Uniform Anatomical Gift Act encompasses sections 7150 through 7151.40 of the Health and Safety Code.

above, any portion of the human body is a “part” for purposes of the Uniform Anatomical Gift Act. Again, human tissue is a “part” of a donor’s body that may be gifted under both the former and current Uniform Anatomical Gift Act.

The 2006 letter discusses how the former Uniform Anatomical Gift Act defines “part” as including tissue; however, it provides no analysis of why this definition should not be considered for purposes of Section 33. We are not persuaded by the 2006 letter’s discussion of Health and Safety Code section 7054.4. While this statute separately addresses “recognizable anatomical parts” and “human tissue,” it does not follow that human tissue is not a human body part. Section 33 applies to *any* human body parts; it is not limited to recognizable human body parts. Furthermore, we disagree with the 2006 letter’s statement that the ordinary use of human body parts refers to items recognizable to the unaided eye.

In addition to being defined for purposes of the Uniform Anatomical Gift Act, “human tissue” is also defined in Health and Safety Code section 1635 as “any human cell, group of cells, tissue or organ including the cornea, sclera, or vitreous humor and other segments of, or the whole eye, bones, skin, arteries, sperm, blood, other fluids, and any other portion of a human body.”

In short, we conclude that for purposes of Section 33, “human body parts” means any portion or part of the human body, including any human cell, group of cells, tissue or organ, eye, bones, skin, arteries, sperm, blood, other fluids, and portions derivative thereof, including, for example, proteins (inclusive of enzymes).

Held in a bank

Section 33 does not define the term “bank” as it is used therein. The 2006 letter concludes, based on definitions of “blood bank” in Health and Safety Code section 1600.2 and California Code of Regulations, title 17, section 997,⁴ “tissue bank” in Health and Safety Code section 1635,⁵ and “mother’s milk bank” in Welfare and Institutions Code section 14132.34,⁶ that for purposes of Section 33, a “bank” is an organization that processes, stores, and distributes in a not-for-profit transaction blood products or human body parts pursuant to statute.

The 2006 letter notes that entities that operate as any of the banks mentioned above must be licensed by the Department of Health Services, citing Health and Safety Code sections 1602.5 (blood banks), 1635.1 (tissue banks), and 1639.5, subdivision (b) (mother’s milk banks). As each of these types of banks must be licensed under California law, the 2006 letter concludes that

⁴ Health and Safety Code section 1600.2 defines a blood bank as “any place where human whole blood . . . and derivatives specified by regulation are collected, prepared, tested, processed, or stored, or from which human whole blood . . . or derivatives . . . are distributed.” California Code of Regulations, title 17, section 997, subdivision (a), which interprets section 1600.2, defines a blood bank as “a medical facility designed, equipped, and staffed to procure, to process, to store, or to distribute human whole blood or blood derivatives for transfusion purposes.”

⁵ Health and Safety Code section 1635, subdivision (d) defines a tissue bank as “any place, establishment, or institution that collects, processes, stores, or distributes tissue for transplantation into human beings.”

⁶ Welfare and Institutions Code section 14132.34, subdivision (b) defines a mother’s milk bank as a “person, firm, or corporation which engages in the not-for-profit procurement, processing, storage, distribution, or use of human milk, contributed by volunteer donors, in compliance with standards prescribed by the human Milk Banking Association of North America.”

a “bank,” within the meaning of Revenue and Taxation Code section 33 must not only perform the tasks described in the authorizing statutes but must also be licensed as such under the applicable law.

Section 1635.1, subdivision (a) of the Health and Safety Code states that, except as provided in subdivision (b), every tissue bank operating in California must be licensed by the Department of Public Health. The licensing requirements do not apply to the collection, processing, storage, or distribution of tissue for autopsy, biopsy, training, education, or for other medical or scientific research or investigation, where transplantation of the tissue is not intended or reasonably foreseeable. (Health & Saf. Code, § 1635.1, subd. (b)(2).) Such entities do not qualify as “tissue banks” under section 1635, subdivision (d).

While the entities described in subdivision (b)(2) of Health and Safety Code section 1635.1 are not considered tissue banks for the purposes of licensing requirements, it does not follow that the term “bank” should be limited to banks licensed under the Health and Safety Code. The California Department of Public Health’s Web site’s Frequently Asked Questions page concerning tissue bank licensing⁷ reveals that the Department of Public Health does not view the term “bank” as being limited to licensed facilities:

- Q. What if I work with human tissue but only in a research capacity, e.g., not for purposes of transplantation?
- A. You need not apply for a tissue bank license if your purpose is for other than human transplantation. For instance, if you are involved in *tissue banking* for the purposes of autopsy, biopsy, training and education, or for other medical or scientific research or investigation where transplantation of the tissue is not intended or reasonably foreseeable you are exempt from this chapter of the law. (Emphasis added.)

In other words, tissue banks are not limited to entities which store tissue for purposes of transplantation; rather, certain tissue banks are simply exempt from licensing requirements.

Furthermore, Health and Safety Code section 1635 is not the only statute that defines “tissue bank” in the Health and Safety Code. The Uniform Anatomical Gift Act defines a tissue bank as “a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue. (Health & Saf. Code, § 7150.10, subd. (a)(31).) A person need not be licensed as a tissue bank under Health and Safety Code section 1635.1 in order to be a tissue bank under Health and Safety Code section 7150.10.

For purposes of the Uniform Anatomical Gift Act, “procurement organizations” include eye banks,⁸ organ procurement organizations, or tissue banks. (Health & Saf. Code, § 7150.10, subd. (a)(21).) Health and Safety Code section 7150.50, subdivision (c) provides rules for when

⁷ <http://www.cdh.ca.gov/programs/lfs/Documents/Tissue%20Bank%20FAQ.pdf>

⁸ An eye bank is “a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes. (Health & Saf. Code, § 7050.10, subd. (a)(10).)

anatomical gifts of specific parts are made without naming a person to whom the gift is made but providing a purpose for which the gift may be used. If the part being given is an organ, an eye, or tissue and the gift is for the purpose of research and education, the gift passes to the appropriate procurement organization. (Health & Saf. Code, § 7150.50, subd. (c)(4).) In other words, if tissue is being given for the purpose of research or education, the tissue passes to the appropriate tissue bank. (*Ibid.*; see Health & Saf. Code, § 7150.10, subd. (a)(31).)

Additionally, Health and Safety Code section 7150.50, subdivision (f) provides that if a document of gift specifies a general intent to make an anatomical gift, the gift may be used for transplantation, therapy, research or education, and the gift passes in accordance with subdivision (g). Health and Safety Code section 7150.50, subdivision (g)(2) states that in such circumstances, if the gift is tissue, the gift passes to the appropriate tissue bank. Again, under the Uniform Anatomical Gift Act, a tissue bank may use tissue for purposes of transplantation, therapy, research or education.

Based on the discussion of tissue banks and eye banks in the Uniform Anatomical Gift Act along with the relevant Frequently Asked Questions on the Department of Public Health's Web page, we conclude that banks are not limited to facilities licensed as banks by the State of California. Banks may hold tissue for purposes discussed in Health and Safety Code section 7150.50, subdivision (g)(2) and section 1635.1, subdivision (b)(2), that is, for transplantation, therapy, research, education, autopsy, biopsy, training, or for other medical or scientific research or investigation. Furthermore, there is no legal basis for limiting the definition of banks to non-profit entities.

We note that the discussion of banks in the 2006 letter is inconsistent with the 2005 letter's conclusion that purchases of human tissue by a biotechnology companies (which presumably operate for profit and are not licensed as tissue banks⁹) are exempt under Revenue and Taxation Code section 33. The 2005 letter does not analyze what is a "bank" under Section 33; however, the conclusion that the use of tissue by the biotechnology companies is not subject to tax cannot be reconciled with the analysis of the 2006 letter.

In light of the foregoing, we believe a broad definition of "bank" is appropriate. Accordingly, we conclude that "bank," for purposes of Section 33, means a facility that lawfully exists as a repository for human body parts, including any facility operating as a medical, research, or scientific institution that lawfully maintains inventories of human body parts.

Medical purposes

The 2005 letter and 2006 letter are consistent in their analyses of "medical purposes." Both letters conclude that "medical purposes" include research and development undertaken to develop new drugs and medicines and treat human illness. In other words, "medical purposes" includes autopsy, biopsy, training, education, or other diagnostic, investigation or research

⁹ As acknowledged in the 2006 letter and discussed in footnote 5, *supra*, tissue banks process, store, or distribute human tissue *for transplantation into human beings*. The biotechnology companies that were the subject of the 2005 letter were purchasing tissue for purposes of research, not transplantation.

activities, in support of medical science. No correction to the prior analyses of “medical purposes” appears to be necessary.

Conclusion

Section 33’s requirements that property be held in a bank for medical purposes applies only to human body parts and does not apply to human whole blood, plasma, blood products, or blood derivatives.

For purposes of Revenue and Taxation Code section 33, “human body parts” means any portion or part of the human body, including any human cell, group of cells, tissue or organ, eye, bones, skin, arteries, sperm, blood, other fluids, and any derivative portions thereof, including, for example, proteins (inclusive of enzymes). “Bank” means a facility that lawfully exists as a repository for human body parts, including any facility operating as a medical, research, or scientific institution that lawfully maintains inventories of human body parts. “Medical purposes” includes autopsy, biopsy, training, education, or other diagnostic, investigation or research activities, in support of medical science.

In sum, we will delete Annotations 495.0050 (1/20/06) and 540.0315 (1/20/06) in accordance with the conclusions reached herein. No application should be given to these annotations or their back-up letters for periods prior to the deletion of these annotations.

I hope this answers your question. If you have further questions, please write again.

Sincerely,

Cary Huxsoll
Tax Counsel

CH/yg