



COLORADO
Department of Revenue

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PLR-17-003

May 11, 2017

XXXXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

Re: Non-Transplantable Human Tissue

Dear XXXXXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXX (“Taxpayer”) a request for a private letter ruling to the Colorado Department of Revenue (“Department”) pursuant to Department Rule 24-35-103.5. This letter is the Department’s private letter ruling. This ruling is binding on the Department to the extent set forth in Department Rule 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issue

Is the charge by Taxpayer for provisioning non-transplantable human tissue to third parties subject to sales and use taxes.

Conclusion

The charge by Taxpayer for provisioning non-transplantable human tissue to third parties is subject to sales and use taxes.

Structure of Analysis

To determine whether non-transplantable human tissue provisioned to third parties is subject to tax, the Department will examine the following question:

1. Is the transaction subject to sales and use tax pursuant to §§ 39-26-104(1) and 202, C.R.S.
 - a. Is the money paid by Taxpayer’s customers in exchange for the tissue pursuant to § 39-26-104 C.R.S.?
 - b. Is the tissue tangible personal property pursuant to §§ 39-26-104(1) and 202, C.R.S.?
 - c. Is the true object of the transaction the sale of tangible personal property or the sale of a service?

Background

Taxpayer supplies non-transplantable human tissue to medical facilities, hospitals, universities, academic medical centers, medical training organizations, and medical device manufacturers, among others. Taxpayer obtains the tissue from donors or donors' representatives in various venues, such as hospitals, funeral homes, and hospices. The process of obtaining, processing, storing, preparing, and transporting human tissue is labor intensive. Taxpayer charges its clients (the recipients of the tissue) a fee, which Taxpayer characterizes as a fee for the service of processing and handling of human tissue. Taxpayer represents that this characterization of the transaction as a service is common in this industry.

Discussion

Colorado imposes sales tax on the sale of tangible personal property but generally not on the sale of services.¹ Tangible personal property means corporeal property.² Corporeal property is defined as a thing that has a physical existence.³ A sale of corporeal property occurs when a buyer pays money or other consideration "in exchange for" an interest, or part of an interest, in corporeal property.⁴ In this ruling, we examine each of these elements, focusing particularly on the "in exchange for" requirement, the classification of tissue as "property", and the "true object" of the transaction.

1. *Payment "in exchange for" tangible personal property or services.*

Taxpayer states that the payment it receives from clients is not "in exchange for" the tissue itself but, instead, for the service of acquiring, preparing, preserving, and delivering the tissue to the client.⁵ Taxpayer asserts that this characterization is necessary because federal and state law prohibit the sale of human tissue and social norms disfavor the sale of transplantable human tissue.⁶

It is worth noting at the outset of our discussion that every sale of taxable goods has labor and other service-related cost components that are recovered in the purchase price. These service-related costs include such things as the costs of acquisition, preparation, preserving the product, and delivering the product to the buyer: the very same cost components identified by Taxpayer. These cost components are often large and can exceed the cost of the raw material itself.

¹ § 39-26-104(1), C.R.S.

² § 39-26-102(15), C.R.S. and Department Rule 1 CCR 201-4, 39-26-102.15 ("Tangible personal property" embraces all goods, wares, merchandise, products and commodities, and all tangible or corporeal things and substances which are dealt in, capable of being possessed and exchanged, except newspapers excluded by the law.").

³ *Black's Law Dictionary* 368 (8th ed. 2004), corporeal property.

⁴ Department Rule 1 CCR 201-4, 39-26-102.10 ("Sale" or "sale and purchase" shall mean any transaction, except as provided in 26-102.7(b), whereby a person, in exchange for any consideration, such as money or its equivalent, property, the rendering of a service, or the promise of any of these things: (a) transfers or agrees to transfer all or part of his interest, or the interest of any other for whom he is acting as an agent, in any tangible personal property to any other person; or (b) performs or furnishes, or agrees to perform or furnish, or contracts to have another perform or furnish, any service taxable under this Act for any other person." (emphasis added)).

⁵ It is common in this industry to characterize the transaction as the sale of a service in order to avoid the legal and social issues surrounding human tissue donation.

⁶ National Organ Transplant Act of 1984, 42 U.S.C. §274e(a), which outlaws the acquisition, transfer, or receipt of human organ for consideration for use in human transplantation, and §289g-2(a), which relates to the transfer of human fetal tissue..

Moreover, Colorado tax statutes expressly contemplate that taxable sales of goods have service-related costs reflected in the purchase price.⁷ For example, the statutory definition of a taxable “sale” of goods states that the costs of labor must be included in the calculation of the taxable purchase price.⁸ Indeed, a retailer may have absolutely no material costs in the goods it sells, as in the case of goods donated to a retailer (e.g., a charitable organization selling donated goods for fundraising) and may expend considerable labor resources to acquire, prepare, store, and deliver, these goods to the buyer. These sales are clearly subject to sales tax.⁹ The fact that the retailer obtains the goods or raw materials at no cost does not convert the subsequent sale of goods into a sale of services. Moreover, the Department has consistently rejected on several occasions efforts by retailers and buyers to avoid tax on these service components by separately stating them on the invoice or in the contract.¹⁰

These principles apply equally to the sale of organic tissue in all its forms. For example, animal or plant tissue, whether for consumption or research, is a sale of tangible personal property and the labor incurred in each instance to acquire, process, prepare, and transport the material is undoubtedly significant, if not in excess of the cost of the original material, and yet these labor costs do not convert the transaction into a sale of services.

More importantly, a contrary position would fundamentally undermine sales tax law applicable to all retailers. A retailer could assert, under the theory proposed by Taxpayer, that it is not selling goods but merely providing the service of obtaining, preparing, and delivering goods to the buyer. Or stated another way, Taxpayer’s argument would permit a retailer to avoid sales tax by characterizing its transaction as one of providing the service of moving tangible property from the supplier who holds the material to the buyer who wants the product.

We also think it simplifies the nature of the transaction to say that Taxpayer is merely providing a service of matching the donee with the donor. This is not, for example, a broker relationship where the broker is merely providing the non-taxable service of finding a willing seller and buyer. A broker does not take any ownership interest in the property and does not engage in an intermediary use of the property. As we discuss below, Taxpayer has an ownership interest in the tissue, processes the tissue, and uses that interest to control the use and disposition of the tissue.

A common example of this is the application of sales and use taxes to those engaged in the processing and fabrication of goods.¹¹ A processor is one who takes material, either in its raw state or in a partially processed state, and, by such activities as cutting, heating, freezing, molding, mixing and combining it with other components, such as water, dyes, chemicals, and preservatives, processes the material into a different, and sometimes only

⁷ See, for example, § 39-26-102(12), C.R.S. which states that sales tax applies not only to the materials used but also to the labor expended in bringing the goods to market.

⁸ § 39-26-102(12), C.R.S. See also, Department Regulation 1 CCR 201-4, 39-26-102.12

⁹ For example, the sale of donated goods by a charity are clearly taxable even though the charity has absolutely no cost related to the goods.

¹⁰ See, for example, GIL 16-018, GIL 11-002, and PLR 10-004.

¹¹ Colorado’s tax code is replete with examples of the taxability of processed, fabricated, and manufactured, products, from the definition of “sale”, which includes goods made to order and custom orders, to exemptions for machinery used to process, fabricate, or manufacture property.

slightly different, version of the original product.¹² A food processor is a common and perhaps the best example of a business engaged in processing. A food processor takes plant or animal tissue in its raw form and cuts, freezes, mixes with preservatives or dyes, molds, reshapes, and otherwise modifies the product in some fashion to produce a modified product. The food processor stores, often by refrigeration, the material and, when an order is placed for the product, ships the product to the end user. This processing may be substantial or it may be relatively rudimentary. This is precisely what Taxpayer does. Taxpayer describes its process as follows: “processing, storage, preparation, and transportation” of human tissue.

To distinguish itself from these common tax situations, Taxpayer argues that the sale of human tissue is illegal and, therefore, the transaction must be characterized as a sale of services. Except for the relatively limited area of human fetal tissue, we disagree with the basic premise that federal and state law prohibit the sale of human tissue for purposes engaged in by Taxpayer. We also disagree with the notion that illegal sales must be recast as sales of services.

First, with respect to Taxpayer’s primary argument that federal and state law prohibit sales of human tissue, we have extensively researched and examined the relevant statutes, commentaries, and other materials and conclude that Taxpayer’s assertion is not supported, with the exception of human fetal tissue.¹³ The federal law most often raised in this context and cited to us by Taxpayer is the National Organ Transplant Act (“NOTA”).¹⁴ This act prohibits the sale of human tissue “for purposes of transplantation”. The plain terms of this statute make only the sale of tissue for transplantation illegal. In pertinent part, this federal law states,

(a) Prohibition

It shall be 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. The preceding sentence does not apply with respect to human organ paired donation.
(emphasis added)

...

(c) Definitions.

For purposes of subsection (a) of this section:

- (1) The term "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.

¹² We do not imply here that Taxpayer must be engaged in processing in order for tax to apply.

¹³ 42 U.S.C. § 289g-2 (“It is unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.”).

¹⁴ National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984), 42 U.S.C. § 274(e).

(2) The term "valuable consideration" does not include the 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.

Taxpayer itself recognizes this distinction between unlawful sales for transplantation and lawful sales for non-transplantation purposes in its business operations. Taxpayer goes to great length in its documentation with donors, clients, and in the informational material made available to the public to make clear that it is not providing human tissue for transplantation purposes. For example, Taxpayer's contract with clients (those receiving the tissue) states that the tissue is provided for non-transplantation purposes.

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Taxpayer's website discloses in multiple places that it provides human tissue only for "non-transplantation" purposes. These affirmative statements of what it does and does not provide reflect, we think, the reach and limits of NOTA.

Taxpayer has also not cited to us any Colorado law that prohibits the sale of human tissue for non-transplantation purposes. Taxpayer points us to Colorado's Uniform Anatomical Gift Act, §12-34-102, et seq., C.R.S., which Taxpayer asserts prohibits the sale of human tissue. This Act creates rules governing how and when donations of human tissue can be made. The only provision of this Act that relates to a prohibition against the sale of human tissue is §12-34-116, C.R.S., which states that the sale of human tissue "for transplantation" purposes is unlawful. In fact, this provision does not even create any state prohibition against the sale of human tissue; it simply refers to the federal prohibition in NOTA.

(a) Except as otherwise provided in subsection (b) of this section, a person that knowingly acquires, receives, or otherwise transfers a part for valuable consideration for transplantation may be liable as specified in 42 U.S.C. sec. 274e.

(b) A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part.

Moreover, this statute does not purport, implicitly or explicitly, to govern the application of Colorado sales and use taxes. State legislatures that have addressed the taxability of sales of human tissue have expressed their intention to do so by explicitly enacting an exemption in the appropriate tax statute. Colorado's legislature has not. Moreover, an implicit authorization to do so cannot be inferred from a non-tax statute, particularly when the statute, itself, does not proscribe sales for non-transplantation purposes.¹⁵

¹⁵ This is particularly true given that the rationale for restriction on the sale of transplantable human tissue in the Uniform Anatomical Gift Act was not solely a response to the social value and norms cited by Taxpayer in its Private Letter Ruling Request. Rather, the Comment to the Uniform Anatomical Gift Act expressly states that the rationale for the prohibition on sale is: "Any perception on the part of the public

The one limited exception where we agree that the sale of tissue is illegal is set forth in the Public Health Services Act,¹⁶ which prohibits the purchase of human fetal tissue for any purpose. Specifically, this Act states, in pertinent part,

- (a) Purchase of tissue. It is unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.

We discuss in more detail immediately below the implication of this limited prohibition on the application of state sales and use taxes.

The second step in Taxpayer's two-pronged argument is that the purported unlawful sale of human tissue requires that these transactions be construed as the sale of services. To this end, Taxpayer represents that its pricing model uses cost components related to its preparation, storage, and delivery of tissue.¹⁷ Taxpayer further represents that the tissue itself has no value¹⁸ because, again, it is purportedly unlawful to sell it for non-transplantation purposes.

Whether the sale of property is illegal under federal or state law simply has no bearing on whether the sale is taxable. *See, e.g., Dep't of Revenue v. Kurth*, 511 U.S. 767, 777 (1994) ("the unlawfulness of an activity does not prevent its taxation"; case involving state tax on storage and possession of illegal drugs); *Simpson v. Bouker*, 249 F.3d 1204, 1210-13 (10th Cir. 2001) (Kansas' stamp tax on possession and sale of marijuana valid). If such were the case, then a seller of illicit drugs could argue with success that he or she is not selling illicit drugs because such sales are illegal and, therefore, the dealer is simply providing a non-taxable service of procuring, preparing, and delivering illicit drugs. The Department has never accepted such a characterization and assesses sales tax on the unlawful sales of controlled substances because the dealer is selling tangible personal property and not simply providing the services to bringing together a willing supplier and buyer.¹⁹

In *Alabama Plasma v State of Alabama*, S. 99-329, 2000 Ala. Tax LEXIS 83 (AL Department of Revenue 10/13/2000), the state rejected the same arguments advanced here by Taxpayer. In that case, the taxpayer argued that its sale of blood products was the sale of a service because state law prohibited the sale of blood used for injection into humans (i.e., transplantation). The taxpayer collected blood, processed it into its

that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it was undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system." Unif. Anatomical Gift Act § 10 cmt (1987). Those concerns do not apply with equal force to Taxpayer's sales of nontransplantable for "research, training and overall medical advancement." (PLR Req. at 1).

¹⁶ 42 U.S.C. § 289g-2

¹⁷ Taxpayer's invoices do not show this cost structure. In the sample invoice provided us, the invoice state a single price for the tissue, together with separate pricing for packing material. Taxpayer has not demonstrated in any verifiable manner that its pricing is as represented. Nevertheless, we accept as true for purposes of this discussion, that Taxpayer's pricing model is as represented.

¹⁸ In the next two sections of this ruling, we examine the claim that human tissue has no value. Suffice it to say at this point, that human tissue, and particularly the tissue at issue in this ruling, has enormous value.

¹⁹ *Eggleston v. Colo.*, 636 F. Supp. 1312 (D. Colo. 1986).

constituent parts, and then sold the blood products to research facilities for research purposes and not for injection into humans. The state rejected taxpayer's arguments both that the state made its sales illegal and, even assuming the sale were unlawful, the non-tax statute governed or superseded the state's tax statutes. First, the department noted that the state prohibited the sale of blood applied only if the blood was injected into a person. The blood products produced by the taxpayer were expressly made for non-injection purposes, similar to Taxpayer's provisioning of human tissue for non-transplantation purposes. The department then cited with approval *Community Blood Bank, Inc. v. Russell*, 196 So.2d 115 (Fla. 1967), in which the Florida Supreme Court held that the sale of blood clearly fell within the ambit of the sales tax statute and the transfer of blood for consideration was a taxable sale. We think the same sound analysis applies to this case.

More generally, the proper frame of reference for determining whether a transaction is a taxable sale is by reference to Colorado's tax statutes and not by reference to non-tax statutes. In *Parkridge Hospital v. Jayne Ann Woods, Tennessee Comm'r of Revenue*, 561 S.W.2d 754 (TN 1978), the taxpayer argued that the sale of blood was the sale of a service because the sale of blood under the state's commercial code was classified as the sale a service (presumably to foreclose claims based on warranties of merchantability and fitness for a particular purpose). The court first noted that the sale of human blood clearly fell within the ambit of state's tax statutes. In rejecting the taxpayer's next argument that a non-tax statute governed the tax code, the Court stated,

[i]t is the fundamental rule of statutory construction to ascertain and give effect to the intention or purpose of the Legislature as expressed in the statute. The purposes of the Uniform Commercial Code as enumerated in T.C.A. 47-1-102 are "to simplify, clarify and modernize the law governing commercial transactions." The purpose of the sales and use tax is to derive revenue for the State. Both laws are inclusive and are sufficient to regulate the subject matter their enactment is purported to cover and regulate. The issue thus becomes whether the enactment by the Legislature in the Uniform Commercial Code, to the effect that human blood "shall not be considered commodities subject to sale or barter *****," excludes human blood from taxation under the sales and use tax law. The Court concludes it does not.²⁰

It is worth noting here that the Tennessee commercial code provision at issue is much more specific than the Colorado statute relied on by Taxpayer.

Finally, and accepting for purposes of argument Taxpayer's assertion that the tissue has no value, a retailer who sells goods obtained by donation or otherwise without cost and sells those goods at a price measured by its labor costs to acquire, store, and deliver the goods has engaged in a taxable sale. For example, a company that sells various gases will acquire the raw material (air), which has no value in and of itself, and then processes it into its constituent parts (oxygen, nitrogen, carbon dioxide, helium). The company cannot recast its transactions as the sale of services by constructing a pricing scheme that identifies only the service-related costs, even if, as it will, assign no cost to the air itself. And as we have noted elsewhere, this act of processing is, itself, not a requisite to

²⁰ See also, *In re: A Finding Concerning A Claim for Refund Filed by XYZ Blood Center, Inc.*, 1992 S.C. Tax LEXIS 58 (S.C. Comm'n Decision No. 92-26 Feb. 28, 1992).

taxability. A retailer of sea shells found lying on a beach is as much a seller of taxable goods as is a retailer who fabricates the sea shells into pieces of jewelry.

For purposes of completeness, we think it is important to discuss two areas that we considered but were not raised by Taxpayer. We discussed above the prohibitions in both NOTA and the Public Health Services Act against the transfer of human tissue. Both prohibitions require a transfer for “valuable consideration.” “Valuable consideration” is defined to exclude payments for the type of activities that are engaged in by Taxpayer. For example, NOTA²¹ defines “valuable consideration” to exclude,

the 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.

We note that the activities described in that definition are services. One possible inference that can be drawn from this definition is that the federal statute is assuming that the transactions at issue are the sale of services. This inference is consistent with Taxpayer’s view that this industry has adopted a view that it is providing a service and not the sale of tissue. However, this federal statute neither expressly nor implicitly requires states also accept this characterization of the transaction for purposes of state tax law. Moreover, and as concluded in *Parkridge Hospital*, it is simply incorrect to resolve a tax issue by inferring that a non-tax federal statute is intended to override a state tax statute.

2. *Human tissue as property.*

We next turn to the question of whether a person can have a property interest in human tissue. In recent years and with the advancements in science and medicine, there has been substantial growth in the human tissue industry. There is, in fact, a robust market for human tissue that has developed into a multi-billion dollar industry.²² People routinely sell a variety of human tissue²³: human blood (up to \$1,000 for blood with rare antibodies), human eggs (\$25,000-\$50,000 for eggs in a single cycle), bone, skin, and hair (for wigs). A single human cadaver can generate between \$100,000 to \$300,000 in revenue for companies such as Taxpayer.²⁴ The commercialization of human tissue has prompted a closer examination of the question whether one can have an ownership interest in human tissue.²⁵

²¹ The Public Health Service Act has a similar definition. See, 42 U.S.C. 289g-2(e)

²² Wharton, University of Pennsylvania, *The Billion-Dollar Body Parts Industry: Medical Research alongside Greed and Corruption*, August 9, 2006 at <http://knowledge.wharton.upenn.edu/article/the-billion-dollar-body-parts-industry-medical-research-alongside-greed-and-corruption-2/>.

²³ There is some debate about what constitutes human tissue. For example, some argue that gametes, which are related to sperm and egg cells, are not human tissue. In this context, we use human tissue simply to mean a part of a human body.

²⁴ Lisa Milot, *What are We - Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 Wash. & Lee Law Review 1053 (2010); Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* 178 (2006) (estimating a cadaver to have a value of \$220,000); Brenda Reddix-Small, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Livers?*, 10 Vand., J. Ent & Tech. L., 643 (2008); Gina Kolata, *Price of Donor Eggs Soars, Setting Off a Debate on Ethics*, N.Y. Times, Feb. 25, 1998); USA Today, *There’s Money in the business of body parts*, April 7, 2004 (cadavers valued at \$100,000 to \$300,000).

²⁵ See, e.g., E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* 3 (1996). In *Washington University v. Catalona*, 490 F.3d 667 (8th Cir. 2007), *cert denied*, 552 U.S. 1165

It is also important when examining this question to recognize a fundamental premise of property law that property ownership is not a single right of ownership but rather a bundle of several rights in property. For example, a seller may sell the right to use the property but not sell the title to the property. Colorado tax statutes do not require that the seller sell the entire bundle of rights in goods in order to incur tax liability. This is made clear in Department Rule 1 CCR 201-4, 39-26-102.11, which defines a “sale” as,

any transaction, except as provided in 26-102.7(b), whereby a person, in exchange for any consideration ...: (a) transfers or agrees to transfer all or part of his interest, or the interest of any other for whom he is acting as an agent, in any tangible personal property to any other person;... ...[A] transaction ... shall be considered a sale if it transfers from a seller to a buyer the ownership or possession of tangible personal property (emphasis added)

Common examples of this principle include companies that rent equipment or license computer software. Possession and the right to use are only some of the “sticks in the bundle of property rights”²⁶ that constitute the rights of ownership. A buyer of computer software or person who rents property incurs sales and use tax liability even though the consumer obtains only some of the rights of ownership (e.g., a license to possess and use software or the contractual right to possess and use property in the case of rental companies). This discussion is important, as we will discuss below, because Taxpayer transfers most, but not all, of its ownership rights to the tissue to clients.

Taxpayer acquires both a right to possess and right to dispose, as well as other ownership interests in the human tissue when it takes a donation. This is made clear by, among other things, the fact that Taxpayer has no possessory or other interest in the tissue unless and until the donor or donor’s representatives gives Taxpayer consent to possess and use the tissue.²⁷ The donor releases Taxpayer from losses related to the human tissue.

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(2008), the court held that a donor who donated human tissue to a medical school for research relinquished his ownership interest in the tissue because the donation was an inter vivos gift. Missouri law defined an “inter vivos gift as “a voluntary transfer of property by the owner to another, without any consideration or compensation as an incentive or motive for the transaction.” Inter vivos transfers are transfers of ownership in property. If the donor had no ownership interest in his human tissue then an inter vivos transfer would not be possible and the research institution would have not received an ownership interest in the tissue. See also, See I.R.S. Gen. Couns. Mem. 36418, 1975 GCM LEXIS 112, at *1 (Sept. 15, 1975) (declaring that the fair market value of mother’s milk donated to a charitable organization is deductible as a charitable contribution under Int. Rev. Code of 1954, § 170).

²⁶ Dukeminier, et al., Property 80 (7th ed. 2010)

²⁷ §12-34-102, et seq., C.R.S.

²⁸ Taxpayer’s Donor’s Consent form.

This release of claims implies the donor has a legal interest in the tissue that can be protected by law. Moreover, Colorado law makes it clear that the donor, donor's representative, and Taxpayer each have interests in the tissue at different stages in the donation process. Donor and the donor representatives have the right to not transfer tissue to anyone under Colorado's Uniform Anatomical Gift Act. Taxpayer, in turn, acquires the right to use the donated tissue once the donation is made. These are effectively rights of ownership.

This ownership interest in human tissue is also reflected in Taxpayer's contract with clients (the buyers of tissue). When Taxpayer sells tissue to a client, the terms of the contract expressly state that Taxpayer is granting the client a license to use the tissue in certain explicitly defined ways.

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If Taxpayer did not have an ownership interest in the tissue, then Taxpayer would have no legal basis to assert control and possession over the tissue. Client, in turn, acquires by this transaction the right to use and dispose of the tissue subject only to certain limitations. The transfer of these property interests in the tissue from Taxpayer to a client creates a taxable event.

Finally, asserting that neither Taxpayer nor its clients has a property right in the tissue would lead to what is clearly an absurd result. If neither Taxpayer nor the client has an ownership interest in the tissue, then neither could maintain a judicial proceeding to recover human tissue stolen from their premises and no criminal action could be instituted against such a person for theft, because both require that the Taxpayer or client have an ownership interest in the tissue. We are not inclined to adopt such a view.

3. *The true object of Taxpayer's transaction with clients.*

We began the discussion of this issue by noting that sales tax applies to the transfer of tangible personal property even though the retailer has engaged in labor-related activities and that these labor-related activities do not convert the transaction from a sale of goods to a sale of services. Taxpayer's activities of preparing, storing, and shipping the tangible personal property are common activities of almost every retailer.³⁰ Nevertheless, and for sake of completeness, we also evaluate Taxpayer's transactions as if Taxpayer were providing clients a service together with the transfer of the tissue.

To evaluate the tax implications of mixed transactions involving both services and goods, we must refer to Colorado tax statutes and regulations. Colorado law has well established legal principles for analyzing transactions involving both the provisioning of services and

²⁹ Taxpayer's License Agreement form.

³⁰ Department Special Regulation 1 CCR 201-5, SR (Sales) 40. We note again that the true object test applies only to a bundled transaction where the retailer performs a service in connection with the transfer of goods. In this case, the labor-related activities engaged in by Taxpayer are those incurred before the goods are brought to market and are similar to those activities engaged in by nearly every retailer of taxable goods.

tangible personal property. The proper tax analysis is to determine the buyer's "true object" in entering into the transaction.

The true object of some mixed transactions is the sale of services, even though incidental tangible personal property is transferred to the customer. For example, an accountant sells the service of accountancy and this service is not subject to sales tax, even though the accountant gives the client a paper tax return or an opinion letter. The true object of the transaction is the accountant's expertise. The paper tax return or opinion letter, which embodies the result of the accountant's intangible intellectual services, is incidental to that service.

This cannot be said, in any reasonable sense, to be the case for the sale of human tissue. The research laboratory's true object is the tissue itself. Researchers require the human tissue to perform their work. The research facility's interest in Taxpayer's efforts to acquire and deliver the tissue is irrelevant in the same way that they are irrelevant to a buyer of food from a grocery store. How a grocery store acquires, transports, processes, and stores, for example, beef steak is in no sense the true object of the consumer's purchase, although each activity is clearly essential to getting the animal tissue to the buyer and, perhaps, is even of great interest and concern to the consumer. The labor costs incurred to bring tissue to the customer is, as in any sale of goods, simply a necessary cost component of the "sale" of the product but certainly not the true object, in and of itself, of the consumer. Moreover, and for the reasons previously discussed, human tissue is in no sense incidental to the transaction – it is the true object of the transaction.

We note that the application of these tax principles to the case at hand is neither debatable nor unclear. What animates any debate here is Taxpayer's premise that the sale of tissue for non-transplantation is unlawful and, therefore, the transaction must be recast as a sale of services, or that by pricing the transaction by identifying labor costs and reducing the value of the tissue to zero that the transaction is for the sale of a service. For the reasons set forth above, we conclude that Taxpayer is engaging in transactions that are subject to Colorado sales and use taxes.

Finally, we want to acknowledge that the sale of human tissue raises important social and ethical questions. Whether the sale of human tissue should be exempt from sales and use tax, for example, is an important policy question. This is a large industry that will undoubtedly continue to grow with advancements in science and with increases in demand for human tissue. Taxpayer's request is, in essence, a request that these transactions be exempt from sales taxation where no such exemption exists. State legislatures that have addressed this issue have done so directly and unambiguously by adopting specific exemptions for the sale of human tissue.³¹ The Colorado legislature has not exempted the sale of human tissue, either directly or implicitly, and the Department has no authority to create such an exemption.^{32 33} What the Colorado legislature has required of the Department is that it assess tax on the sale of corporeal property.

³¹ See, e.g., Virginia Public Document Ruling, No. 90-25, 03/05/1990. Legislatures grant exemptions with at least an implicit understanding that the property at issue is otherwise subject to tax.

³² Indeed, rules of statutory interpretation direct us not to imply exemptions and to interpret and apply exemptions narrowly. *Security Life & Accident Co. v. Heckers*, 177 Colo. 455, 458, 495 P.2d 225, 226-27 (1972) and *LWD Equipment, Inc. v. Revenue Cabinet*, 136 S.W.3d 472 (Ky. 2004)

³³ It is also worth noting that the Colorado legislature *has* adopted a specific statutory exemption for all purchases made by non-profit charitable and educational institutions (§ 39-26-718 C.R.S.) and

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts. The Department reserves the right, among others, to independently evaluate Company's representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted version of the ruling.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.

government entities (§ 39-26-704 C.R.S.). Thus, while we conclude that the sale of human tissue is not exempt as a function of its status as human tissue, many sales of this tissue will nevertheless be exempt from sales tax as a result of the *buyer's* status as a public or nonprofit educational institution or as a nonprofit hospital.