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February 19, 2008

Karyn Estrella, Executive Director
NEMED
515 Kempton Street
New Bedford, MA 02740

Dear Ms. Estrella:

I am in receipt of your letter dated January 31, 2008 requesting clarification on the taxability of durable medical equipment sold and/or rented by your members. Maine sales tax statute does not define "durable medical equipment" since it does not provide a blanket exemption for items in that category. Alternatively, Maine does provide two exemptions for the type of equipment your members may be associated with. They are as follows:

***Prosthetic devices.** Sale of prosthetic aids, hearing aids or eyeglasses and artificial devices designed for the use of a particular individual to correct or alleviate physical incapacity; and sale of crutches and wheelchairs for the use of invalids and crippled persons and not for rental. (§1760, sub-§5-A)*

***Diabetic supplies.** All equipment and supplies, whether medical or otherwise, used in the diagnosis or treatment of diabetes; (§1760, sub-§33)*

Both of these exemptions are discussed in detail in our Instructional Bulletin #41 "Medicines, Medical Equipment and Prosthetic Devices". A copy of this bulletin is available at <http://www.maine.gov/revenue/salesuse/salestax/bulletinssales.htm>. I will provide answers to your specific questions posed in item 3 of your letter.

The first issue (a.) raises three questions; 1) is a 13-month capped lease purchase program a sale or a lease, 2) is the taxability of the equipment affected by the fact that it is prescribed by a physician and 3) is the taxability of the equipment affected by the fact that it is paid for by Medicare? First, MRS would consider the 13-month capped lease purchase program as a month-to-month lease with a sale of the equipment occurring in the 13th month since title to the property reverts to the patient at the end of the 13 months. It is our understanding that changes to the payment rules for capped rental of DME effective January 1, 2006, now require that the patient receive title to the property after 13 months with Medicare continuing to pay for maintenance and servicing of the item. Previously, the patient had the option to purchase and if that option was not exercised by the 10th month, Medicare would continue to make rental payments through the 15th month at which time the equipment remained with the patient but the supplier retained ownership of the equipment. Second, for Maine sales tax purposes, prescriptions by a physician

only have an effect on the exemption for medicines. (*See §1760, sub-§5.*) Lastly, the sale is to the patient. Medicare is a third party payer and not the purchaser of the equipment. (*See Arthur R. Gould Memorial Hospital v Halperin, KENSC-CV-78-796.*) This transaction could involve two separate transactions; use by the provider and a subsequent sale to the patient. Since the 13-month capped lease program is a month-to-month lease, the provider is responsible for use tax on the cost of the equipment to the provider. Similar to a rent-to-own transaction, if the patient rents the equipment continuously for 13 months, the patient receives title to the property. As a result, a sale occurs with the sale price equaling the last monthly payment. Sales tax would apply to this final payment.

Your next point (b.) is that our auditors have told providers that they are required to pay the sales tax if they are unable to collect it from the patient, even though they have paid the use tax. Sales tax is a levy on the consumer but is required to be collected by the retailer. (*See §§1753 and 1812.*) While it is true that the providers are responsible for payment even if the patient is in arrears, I am not sure what is meant by “even though they have paid the use tax”. If you mean that the provider has mistakenly paid or accrued use tax on these same transactions, you are incorrect. If use tax has been paid in error, the use tax can be refunded to the provider. If this is not the case, I need further clarification of the issue.

Lastly (c.), you seek clarification on whether or not wheelchairs are subject to use tax. You will note that “wheelchairs” are specifically mentioned in the exemption for “prosthetic devices”. The exemption, however, specifically refers to the “sale of...wheelchairs for the use of invalids and crippled persons and not for rental”. It is clear that this exemption is for sales tax associated with the “sale of” the wheelchair. This exemption would not apply to use of the wheelchair by the provider under a rental agreement. The provider would owe use tax on the provider’s cost of the wheelchair. No refunds would be allowed as use tax is due.

I hope this provides you with the clarification you are seeking. If you have other questions, I would suggest that you contact Peter Beaulieu, the Director of the Sales, Fuel and Special Tax Division, at (207) 624-9732. Certainly, if clarification is needed to our bulletin, he would be receptive to working with you to develop language and/or examples that would better assist your members in administering the sales tax law.

Sincerely,

Jerome D. Gerard, Acting Executive Director