S T A T E O F T E N N E S S E E
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Opinion No. 06-020 (Revised)

Liability of Audiology Practitioners for Payment of Business Tax and Sales and Use Tax

QUESTIONS

1. Are sales of hearing aids by audiologists subject to the business tax?

2. Are items which are accessories or components of hearing aids exempt from sales and use tax?

OPINIONS

1. Yes. Sales of hearing aids by audiologists are subject to the business tax. Tenn. Code Ann. § 67-4-708(3)(A)(xi).

2. Yes. Items associated with hearing aids or instruments, such as accessories and components, are exempt from sales and use tax under Tenn. Code Ann. § 67-6-329(a)(14)(Supp. 2005) until July 1, 2007. As of July 1, 2007, such items are exempt from sales and use tax under Tenn. Code Ann. § 67-6-314(1)(Supp. 2005).

ANALYSIS

1. Business Tax

Under the Business Tax Act, Tenn. Code Ann. §§ 67-4-701 *et seq.*, taxes are levied upon the privilege of engaging in certain types of business activities. For purposes of the Act, persons[1] are classified according to their dominant business activity. Tenn. Code Ann. § 67-4-708. Under Classification 3 (§ 67-4-708(3)), the following persons are identified:

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> (C) Each person making sales of services or engaging in the business of furnishing or rendering services, except those

[1]"Person" includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit, and the plural as well as the singular number. Tenn. Code Ann. § 67-4-702(12)(Supp. 2005).

> described
> in subdivisions (3)(C)(i)-(xv). It is the legislative intent that the exceptions in subdivisions (3)(C)(i)-(xv) shall include the sales of services by those businesses or establishments so described in the Standard Industrial Classification Index of 1972, including all supplements and amendments prepared by the bureau of the budget of the federal government, except where otherwise provided:
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> (i) Medical, dental, and allied health services to human beings, including sanatorium, convalescent, and rest home care, but excluding services by persons engaged in the business of making dentures and artificial teeth;
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In effect, "medical, dental, and allied health services to human beings" are exempt from the Act's coverage.

This Office has previously opined that the practice of audiology is exempt from the business tax. *See* Op. Tenn. Att'y Gen. No. U82-088 (Apr. 5, 1982). While the statutes underlying that opinion have been amended, the same analysis when applied to the amended statutes still leads to the same conclusion that the practice of audiology is presently exempt from the business tax.

The issue to be decided is whether the sale of hearing aids by audiologists, who are otherwise exempt from the business tax, subjects audiologists to the business tax. Classification 3 (§ 67-4-708(3)) also provides that the following businesses are subject to the business tax:

> (A) Each person engaged in the business of making sales of the following:
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> (xi) . . . hearing aids, . . ., optical supplies except for prescription eye-ware, including eyeglasses, contact lenses and other related tangible personal property, dispensed by an ophthalmologist or optometrist in conjunction with professionals services rendered to patients, . . .;
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> ***

It is apparent that the Legislature has specifically excluded certain services from the Business Tax Act, but in defining services, the Act provides:

> "Services" means and includes every activity, function or work engaged in by a person for profit or monetary gain except as otherwise provided in this part. Services for profit or monetary gain does not include services rendered by a person for an affiliated

> business entity; provided, that the services are accounted for as allocations of cost incurred in providing the service without any markup whatsoever. *"Services" does not include sales of tangible personal property.*

Tenn. Code Ann. § 67-4-702(19)(Supp. 2005)(emphasis added). It is apparent from the foregoing provisions that only specifically described services are exempt from the Business Tax Act and that the sale of tangible personal property, even though in conjunction with the rendering of an exempt service, is a taxable incident. It is, therefore, the opinion of this Office that sales of hearing aids by audiologists are taxable under the Act. To effectuate an exemption here would be without a specific statutory basis and contrary to expressed legislative authority.

This opinion is consistent with the case law relating to exemptions. In *Tennessee Blacktop, Inc. v. Benson*, 494 S.W.2d 760 (Tenn. 1973), the Court observed with respect to tax exemptions:

> Statutes conferring exemptions from taxation are to be *strictly construed against the taxpayer and in favor of the taxing authority*. *Phillips & Buttorff Mfg. Co. v. Carson*, 188 Tenn. 132, 217 S.W.2d 1 (1949). Exceptions from taxation must positively appear in the statute not by implication. *American National Bank & Trust Co. v. MacFarland*, 209 Tenn. 263, 352 S.W.2d 441 (1961).

Tennessee Blacktop at 765 (emphasis added). It had earlier been stated by the Tennessee Supreme Court that:

> Exceptions from taxation are contrary to public policy and can only be allowed when granted in clear and unmistakable terms. They are not creatures of intendment or presumption. If the language in which they are claimed to be granted leaves it doubtful, the benefit of the doubt must be given to the State, the life of which is taxes.

American Bemberg Corp. v. City of Elizabethton, 180 Tenn. 373, 378, 175 S.W.2d 535 (1943) (citations omitted). It is the opinion of this Office that these authorities support the position that sales of hearing aids by audiologists are taxable under the provisions of the Business Tax Act. Tenn. Code Ann. §§ 67-4-702(19)(Supp. 2005) and 67-4-708(3)(A)(xi).

This conclusion is further buttressed by comparing the Legislature's treatment of "optical supplies" with its treatment of "hearing aids" as set forth in Tenn. Code Ann. § 67-4-708(3)(A)(xi), *supra*. The Legislature specifically provided for an exception in the case of sales of prescription eye-ware by ophthalmologists and optometrists, while not providing the same treatment for the sale of hearing aids by audiologists. Thus, the Legislature has implicitly addressed the issue presented here by omitting an analogous reference to the sale of hearing aids by audiologists. The canon of statutory construction *expressio unius est exclusio alterius* (the "expression of one thing is the

exclusion of another") applies here, leaving little doubt that the Legislature did not intend to exempt the sale of hearing aids by audiologists from the business tax.

2. Sales and Use Tax

The exemption for hearing aids found at Tenn. Code Ann. § 67-6-329(a)(14)(Supp. 2005) refers to the definition of hearing aids stated at Tenn. Code Ann. § 63-15-101(4). This definition formerly read "any instrument or device designed for or represented as aiding, improving, or correcting defective human hearing and any *parts*, *attachments* or *accessories* of such an instrument or device." Tenn. Code Ann. § 63-15-101(4) (emphasis added). This definition, however, has been repealed. Nevertheless, the Legislature adopted an identical definition in Tenn. Code Ann. § 63-17-201(6) for the term "hearing instrument." It would thus appear that, for purposes of Tenn. Code Ann. § 67-6-329(a)(14), the Legislature has not expressed any intent to redefine what qualifies as a hearing aid. Consequently, it is the opinion of this Office that the exemption in Tenn. Code Ann. § 67-6-329(a)(14)(Supp. 2005) includes not only the device, but also any accessories or components which typically accompany such a device. This is in accord with the opinion of this Office rendered previously regarding this question. *See* Op. Tenn. Att'y Gen. No. 95-122 (Dec. 22, 1995). It is our understanding that the practice of the Department of Revenue is consistent with this conclusion.

Under the foregoing analysis, said sales are exempt under these provisions until July 1, 2007, at which time the exemption for hearing aids codified at Tenn. Code Ann. § 67-6-329(a)(14) shall no longer be effective. *See* Acts 2004, ch. 959, §§ 16 and 70 and Acts 2005, ch. 311, § 2; *also see Compiler's Notes* to Tenn. Code Ann. § 67-6-329(a)(14)(Supp. 2005). However, as of that date, hearing aids will remain exempt because of several changes made in the Retailers' Sales Tax Act (Tenn. Code Ann. §§ 67-6-101 *et seq.*).

As of July 1, 2007, Tenn. Code Ann. § 67-6-314 will read, in part, as follows:

> There is exempt from the sales tax imposed by this chapter:
> (1) The sale or use of prosthetic devices;
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> * * *

See Compiler's Notes to Tenn. Code. Ann. § 67-6-314 (Supp. 2005).

As of July 1, 2007, Tenn. Code Ann. § 67-6-102(49) will read as follows:

> (A) Prosthetic device means a replacement, corrective, or supportive device including repair and replacement parts for same worn on or in the body to:
> (i) Artificially replace a missing portion of the body;
> (ii) Prevent or correct physical deformity or malfunction; or

(iii) Support a weak or deformed portion of the body;
(B) Prosthetic device does not include:
(i) Corrective eyeglasses; or
(ii) Contact lenses;

See Compiler's Notes to Tenn. Code. Ann. § 67-6-102 (Supp. 2005).

It is the opinion of this Office that "hearing aids" are "prosthetic devices" according to the above definition, since they fall within one or more subcategories of the definition of "prosthetic device"; for example, they are corrective devices worn on the body that correct a physical malfunction, within the meaning of Tenn. Code Ann. § 67-6-102(49)(A)(ii). Accordingly, hearing aids will remain exempt even after the changes in the law take effect on July 1, 2007.[2]

As the definition of "hearing instrument" has not been changed, then the exemption from sales and use tax for hearing aids extends to their *parts, attachments or accessories*.[3] Tenn. Code Ann. § 63-17-201(6).

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[2] This opinion is fortified by the fact that Section 15 of Chapter 357 of the Public Acts of 2003 defined a "prosthetic device" as follows:

(A) Prosthetic device means a replacement, corrective, or supportive device including repair and replacement parts for same worn on or in the body to:
(i) Artificially replace a missing portion of the body;
(ii) Prevent or correct physical deformity or malfunction; or
(iii) Support a weak or deformed portion of the body;
(B) Prosthetic device does not include:
(i) Corrective eyeglasses;
(ii) Contact lenses;
(iii) Hearing aids; and
(iv) Dental prostheses.

Section 2 of Chapter 959 of the Public Acts of 2004 amended Subsection (B) above by deleting "hearing aids" and "dental prostheses" from the exclusion. This implies that these devices will be exempt as "prosthetic devices" as of July 1, 2007, since they come within the ordinary understanding of the definition of "prosthetic device."

[3] The definition of a "prosthetic device" also includes *repair and replacement parts* for same worn on or in the body. Tenn. Code Ann. § 67-6-102(A)(49).

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