IN THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

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GA. TAX TRIBUNAL
JAN 2 2 2020
Yvonne Bouras
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Tax Tribunal Administrator

QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC.,	*	
Petitioner,	*	
v.	*	
	*	DOCKET NO. 1809481
DAVID M. CURRY, in his Official Capacity as Commissioner of the GEORGIA DEPARTMENT OF REVENUE,	*	
Respondent.	*	

ORDER RECONSIDERING THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case is before the Tribunal on the parties' cross-motions for summary judgment. Specifically, the Tribunal must decide whether items presented for exemption for the period of May 2012 – December 2012 by Petitioner Quest Diagnostics Clinical Laboratories, Inc. ("Quest") are "drugs which are lawfully dispensable only by prescription for the treatment of natural persons" under O.C.G.A. § 48-8-3(47)(A)(i) to determine whether Quest is entitled to a refund of sales and use tax for the purchase of these items in the amount of $79,870.90.

On May 31, 2019, Respondent David Curry, Commissioner of the Georgia Department of Revenue ("Department") filed a Motion for Summary Judgment ("Department's Motion"), and Quest filed a Motion for Summary Judgment ("Quest's Motion"). On July 15, 2019, Quest filed a response to the Department's Motion, and the Department filed a response to Quest's Motion. On August 15, 2019, Quest filed a reply to Department's response to Quest's Motion. On August 15, 2019, the Department filed a reply to Quest's response to Department's Motion. A hearing on these motions was held on October 22, 2019. Mr. Clark Calhoun, Esq. and Mr. Andrew Yates,

Esq. appeared on behalf of Quest. Mr. Alex F. Sponseller, Esq. and Ms. Lynn Chen, Esq. appeared on behalf of the Department.

On November 25, 2019, the Tribunal issued an order denying the parties' cross-motions, on the basis that there existed genuine issues of material fact. On December 13, 2019, Quest moved for reconsideration, urging the Tribunal to decide whether the items presented for exemption are "lawfully dispensable only by prescription" and are "for the treatment of natural persons," without deciding whether these items constitute "drugs" under O.C.G.A. § 48-8-2(14). On January 3, 2020, the Department filed its response to Quest's motion for reconsideration, asking the Tribunal to reconsider its prior denial, grant the Department's motion, and affirm the denial of Quest's refund claim.

Having read and considered the relevant briefs, and the arguments of both parties, the Tribunal hereby agrees to reconsider its November 25, 2019, on the limited questions of whether the items are "lawfully dispensable only by prescription" and whether they are "for the treatment of natural persons," as the parties are in agreement that there no genuine issues of material fact exist as to these questions. For the reasons stated below, the Department's Motion is hereby **GRANTED**, Quest's Motion is **DENIED**, and judgment is entered in favor of the Department, without the need to determine whether some or all of the items presented for exemption constitute "drugs" as defined in O.C.G.A. § 48-8-2(14) and as applied to O.C.G.A. § 48-8-3(47)(A)(i).

UNDISPUTED MATERIAL FACTS

1.

Quest Diagnostics Clinical Laboratories, Inc. ("Quest" or "Petitioner") is a clinical laboratory and in the business of "diagnostic testing, information, and services. Taxpayer performs laboratory services in connection with clinical research trials, employment tests, drug tests, and

other diagnostic and prognostic medical testing." Department Statement of Material Facts ("SMF") ¶ 1; Quest Response to SMF ¶ 1.

2.

In order to comply with the Clinical Laboratory Improvement Amendments of 1988 ("CLIA"), Quest's policy is to "perform[ ] only those tests specifically requested by an ordering physician or other person authorized to order laboratory testing under state law." Department SMF ¶ 2; Quest Response to SMF ¶ 2.

3.

Quest's service begins when it "receives laboratory test orders from customers in a variety of ways: on a test requisition, on a script pad, on a client encounter form, over the telephone, electronically via computer interface and fax machines and occasionally on the specimen itself." Department SMF ¶ 3; Quest Response to SMF ¶ 3. A clear test order contains an exact match of a test name or a test code or a check mark that checks off a test order code on a Quest Diagnostics requisition form. Department SMF ¶ 3; Quest Response to SMF ¶ 3.

4.

"After the prescription order is processed and the samples are taken (i.e. blood draw, urine collection, etc.), the samples are packaged and sent by courier to the appropriate Quest laboratory where the diagnostic procedure can be performed." Department SMF ¶ 4; Quest Response to SMF ¶ 4.

5.

Certain chemical "reagents" are used in the diagnostic procedure. At no time are the reagents applied directly to the human body, instead "the reagent is mixed with all or a portion of

the original patient sample to detect a positive or negative occurrence of what the test is intended to diagnose." Department SMF ¶ 5; Quest Response to SMF ¶ 5.

6.

"A reagent is[ ] '[a] substance used in a chemical reaction to detect, measure, examine, or produce other substances.'" In the operation of Quest's business, Quest purchases "vast quantities of biological and chemical reagent." Department SMF ¶ 6; Quest Response to SMF ¶ 6.

7.

Quest claims several different types of reagents, including antibodies, calibrators, controls, fixatives, preservatives, media, and buffers. See Quest's Brief in Support of Motion for Summary Judgment, pp. 26-30. "Antibodies" are "used in a diagnostic assay to detect specific diseases." Id. at p. 27. "Controls" are "substances that are known to produce an expected outcome when introduced to a diagnostic assay," Id. at p. 28, and "calibrators" are "compounds that adjust the chemistry of a testing assay or machinery used to perform a clinical diagnostic test." Id. "Fixatives" and "preservatives" preserve and maintain the integrity of a patient sample. Id. at p. 29. "Buffers" "regulate the acidity and alkalinity of a diagnostic assay." Id. "Media" is "designed to support the growth of the biological markers." Id.

8.

Quest "purchased the items listed on the Revised Schedule Refund Claim from vendors without a prescription written to Quest authorizing Quest to make the purchase." Department SMF ¶ 7; Quest Response to SMF ¶ 7.

9.

Quest submitted an application containing 2,641 line items in August 2015 for sales and use tax refund for the period of May 2012 – December 2012 for the amount of $95,168.45. Department SMF ¶ 8; Quest Response to SMF ¶ 8.

10.

The claim for refund amount was later revised to $82,311.90 in Quest's Revised Schedule Refund Claim to remove non-exempt items from the original schedule. Department SMF ¶ 10; Quest Response to SMF ¶ 10. Quest revised the refund claim again in its Motion for Summary Judgment for a refund in the amount of $79,870.90. Quest SMF ¶ 56.

11.

The refund claim was denied via a letter, Letter ID L1074323984, from the Department of Revenue, dated April 12, 2016. A protest conference was held between the representatives of Quest and the Department of Revenue on October 5, 2016. A letter ruling denying Quest's refund claim was issued on August 10, 2017. Quest appealed the decision to the Georgia Tax Tribunal on September 15, 2017. Department SMF ¶ 15; Quest Response to SMF ¶ 15.

CONCLUSIONS OF LAW

I. Standard of Review.

1.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and that the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Scholastic Book Clubs, Inc. v. Comm'r, 2017-2 Ga. Tax Tribunal, Feb. 14,

2017. The Rules of the Georgia Tax Tribunal likewise provide that "[a] party may move, based on supporting affidavits or other probative evidence, for summary judgment in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for trial." Ga. Comp. R. & Regs. 616-1-3-.19(a).

2.

It is well-settled that "[a] statute must be construed to give sensible and intelligent effect to all of its provisions and to refrain from any interpretation which renders any part of the statute meaningless. Words found in statutes are to be given their plain and ordinary meaning; and statutes that are in pari materia to each other must be construed together." Expedia, Inc. v. City of Columbus, 285 Ga. 684, 689 (2009) (citations omitted). Moreover, "technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning." Rivers v. Revington Glen Investments, 346 Ga. App. 440, 442 (2018); see also O.C.G.A. § 1-3-1 (b).

II. The Statute At Issue.

3.

The statute at issue is O.C.G.A. § 48-8-3(47)(A)(i), which reads as follows:

> **The sale or use of drugs which are lawfully dispensable only by prescription for the treatment of natural persons**, the sale or use of insulin regardless of whether the insulin is dispensable only by prescription, and the sale or use of prescription eyeglasses and contact lenses including, without limitation, prescription contact lenses distributed by the manufacturer to licensed dispensers as free samples not intended for resale and labeled as such[.]

O.C.G.A. § 48-8-3(47)(A)(i) (emphasis added). Hence, the exemption under O.C.G.A. § 48-8-3(47)(A)(i) contains five elements, each of which must be met before a sale transaction may be found to be exempt from sales and use tax. Specifically, O.C.G.A. § 48-8-3(47)(A)(i) requires

that the item purchased to be: (1) a drug; (2) that is dispensed; (3) lawfully only by prescription; (4) for the treatment; (5) of natural persons.

4.

The term "drug" is further defined by O.C.G.A. § 48-8-2(14), which provides that

> "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food and food ingredients, dietary supplements, or alcoholic beverages:
> . . . .
>
> (B) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease[.]

O.C.G.A. § 48-8-2(14). Therefore, at a minimum, an item is a "drug" if it is a "compound, substance, or preparation" that is intended for use in the diagnosis of disease. However, as previously noted, it is unnecessary for the Tribunal to determine whether Quest's reagents are drugs under O.C.G.A. § 48-8-2(14) and O.C.G.A. § 48-8-3(47)(A)(i), for the reasons that follow below.

III. Quest's Purchased Items Were Not "Dispensed" For The "Treatment" Of "Natural Persons."

5.

The Tribunal finds that the plain and technical meaning of Code Section 48-8-3(47) shows that the exemption was meant to apply to "drugs" "dispensed" and administered to a human patient for "treatment," and was not meant to apply to chemical reagents applied to specimens in a laboratory.

6.

First, the plain meaning of the term "dispense" is "to prepare and distribute (medication)," i.e. "dispensing pills to their patients." MERRIAM-WEBSTER DICTIONARY. Second, under Title 26 of the Georgia Code (titled "Food, Drugs, and Cosmetics"), the technical definition of "dispense"

or "dispensing" means "the preparation and delivery of a drug or device to a patient, patient's caregiver, or patient's agent pursuant to a lawful order of a practitioner in a suitable container appropriately labeled for subsequent administration to, or use by, a patient." O.C.G.A. § 26-4-5 (emphasis added). Thus, the plain and technical meaning of the term "dispense" contemplates that a drug be delivered, applied, or administered to a patient directly, not merely used to test a specimen from the patient in a laboratory.

7.

Third, looking at the remainder of the exemption which also exempts "insulin" (whether by prescription or not) and eyeglasses and contact lenses, it is also clear that the exemption was intended to apply to products directly administered to or used by a patient and not to products used exclusively in tests to specimens outside the body. O.C.G.A. § 48-8-3(47); Mathis v. Cannon, 573 S.E.2d 376 (2002) ("It is an elementary rule of statutory construction that a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes "in pari materia," are construed together."). Both insulin and eyewear are injected into or used directly by a natural person and are not used or administered to a specimen in a laboratory. Therefore, when looking at the plain and technical meaning of the term "dispense," and when using the same term for other parts of the same exemption, the Tribunal finds that the exemption was not meant to apply to chemical reagents that are not "dispensed" for "treatment" and thus not administered to or used by a human patient.

8.

In this case, there is no dispute that Quest does not apply reagents to human patients. Department SMF ¶ 5; Quest Response to SMF ¶ 5. Rather, Quest mixes the reagents with specimens in a laboratory and does not administer them to patients. None of Quest's purchases of

"reagents" and related materials thus qualify for the exemption because the materials were not "dispensed" for the "treatment" of a "natural person," as those terms are construed. Hence, regardless if some or all of the materials purchased could be considered "drugs" and available "only by prescription," because the reagents were simply not "dispensed" for the "treatment" of "natural persons," the Tribunal finds that Quest's purchases cannot meet the plain meaning of the exemption and its refund claim was properly denied by the Department. For this reason alone, summary judgment in favor of the Department is appropriate. See Lau's Corporation Inc. v. Haskins, 261 Ga. 491 (1991) ("If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial.").

IV. Quest's Purchases Are Not Exempt Because The Items Claimed Are Not "Lawfully Dispensable Only By Prescription."

9.

The Tribunal also finds that Quest's purchases cannot meet the "only ordered by prescription" element because: (1) the "prescription" orders were for lab tests, not for the reagents themselves; (2) persons other than physicians and licensed practitioners could have ordered the tests; and (3) Quest has produced no documentation that the tests were in fact ordered by prescription by a physician.

10.

As noted above, the exemption only applies if the drugs are "lawfully dispensable only by prescription for the treatment of natural persons." O.C.G.A. § 48-8-3(47). "Prescription" is defined as "an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state." O.C.G.A. § 48-8-2(28). Moreover, Department Regulation 560-12-2-.3(2)(g) further defines

"prescription" as "an order, formula, or recipe issued ... by a duly licensed practitioner authorized by the laws of this state."

11.

First, the Tribunal finds that Quest's argument that it "dispenses" reagents only pursuant to a written order from a physician is incorrect because any orders were for the diagnostic tests and not for the reagents themselves. See Quest's Brief in Support of Motion for Summary Judgment, p. 32. The reagents are admittedly products used to perform tests, and it is undisputed that the physician did not issue any prescription or order whereby a reagent is specifically ordered and dispensed to the patient. Hence, for this reason alone Quest's claim fails.

12.

Second, although Quest claims that "pursuant to its internal policies, before Quest performs any clinical diagnostic test, it must receive a laboratory test order from a person authorized by state law to request the test," see id., p. 32, the Tribunal finds that Quest's assertion is simply not correct as any "authorized person" can request a test, not just a physician. As even Quest's citations recognize, both federal and Georgia law authorize a broader category of persons to make such a request for laboratory testing. Under federal law, "[t]he laboratory must have a written or electronic request for patient testing from an authorized person." 42 C.F.R. § 493.1241(a). Federal law defers to state law as to who is an "authorized person." 42 C.F.R. § 493.2. Under O.C.G.A. § 31-22-4(a), "a clinical laboratory shall examine human specimens only at the request of a licensed physician, dentist, or ***other person authorized by law to use the findings of laboratory examinations.***" Id. (emphasis added). An "authorized person" is not defined, but may include the patient or any person designated by the patient. See generally O.C.G.A. § 31-33-2. Hence, while Quest's internal policies may impose stricter restrictions than federal and state law

in that they would only perform diagnostic tests when a prescription is received, this self-imposed restriction has no bearing upon whether a drug may be lawfully dispensed "only" by prescription. Accordingly, because a person who is not a licensed practitioner can order tests, the Tribunal finds that the reagents and related materials are not "only by prescription."

13.

The Tribunal also finds that Quest's reliance on the State of Washington's sales and use tax exemption statute to support its position that, "when a clinical laboratory uses reagents to perform a diagnostic test, the laboratory is dispensing the reagent pursuant to a prescription," See Quest's Brief in Support of Motion for Summary Judgment, p. 34, is misplaced. The Tribunal finds that Washington's statute is materially different from Georgia's exemption statute. Washington's exemption statute does not impose an "only by prescription" restriction—i.e. Washington will exempt the drug from sales and use tax, regardless of whether the drug may or may not be lawfully dispensed without a prescription. This would exempt from tax the sale and use of over-the-counter drug, which Georgia specifically excludes from its exemption statute. Compare O.C.G.A. § 48-8-3(47) with Wash. Admin. Code § 458-20-18801(403)(d). The Washington Department of Revenue has also issued a very detailed set of rules and regulations for medical substances, devices, and supplies for humans that specifically address reagents. See Wash. Admin. Code § 458-20-18801 (403)(j). Further, Washington also specifically defines "dispense" to mean "the drug involved must be intended to interact with a specific patient through direct contact with that patient, whether applied internally or externally to the patient's body, *or as part of a test conducted on a tissue sample taken from that patient.*" Wash. Admin. Code § 458-20-18801 (403)(b) (emphasis added). Hence, the Tribunal finds that Washington has statutes and rules that are materially different than Georgia's.

14.

Third, the Tribunal finds that Quest has not met the requirement in Department Regulation 560-12-2-.30(3)(c) that the "dealer [] maintain sufficient prescription documentation to support exempt sales." It is undisputed that during the course of the Department's review of Quest's refund claim and during the protest conference, the Department requested but did not receive from Quest any documentation of prescriptions or orders. Department SMF ¶ 11; Quest Response to SMF ¶ 11. Further, during the discovery, Quest did not provide any documentation which showed that the items purchased were actually ordered by prescription. Id. The only "prescriptions" that Petitioner provided were the approximately 30 test requisition or prescription forms, yet the forms do not reference or match up to any specific line items out of the 2,641 lines in the Revised Refund Schedule, much less constitute sufficient documentation that supports Petitioner's claim. Id. If, as Quest claims, the reagents are "lawfully dispensable only by prescription," the lack of prescription documentation in this case shows that either the purchases were unlawful or that the reagents are not in fact "lawfully dispensable only by prescription," or in other words, not prescription drugs. For these reasons, the Tribunal finds that the reagents used by Quest in performance of diagnostic tests were not "lawfully dispensable only by prescription" and thus not exempt.

CONCLUSION

In sum, regardless of whether the reagents used by Quest are "drugs" as contemplated by O.C.G.A. § 48-8-2(14) and O.C.G.A. § 48-8-3(47)(A)(i), the Tribunal finds that the reagents are neither "lawfully dispensable only by prescription" nor "for the treatment of natural persons," thus, Quest's purchases thereof cannot qualify for a refund under O.C.G.A. § 48-8-47(A)(i). Accordingly, the Department's Motion is hereby **GRANTED**, Quest's Motion is **DENIED**, and

judgment is entered in favor of the Department. The denial of Quest's refund claims for state and local sales taxes is hereby **AFFIRMED**.

SO ORDERED, this 22nd day of JANUARY, 2020.

HONORABLE LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL