STREAMLINED SALES AND USE TAX AGREEMENT COMPLIANCE REVIEW AND INTERPRETATIONS COMMITTEE

Interpretive Opinion 2015-1

This Interpretive Opinion recommendation is made to the Governing Board by the Compliance Review and Interpretations Committee this 2nd day of April, 2015, in accordance with Article IX, Rule 902 of the Rules and Procedures adopted by the Streamlined Sales Tax Governing Board, Inc.

Ms. Suzanne Beaudeliare requested the interpretation on March 4, 2015. Ms. Beaudeliare requested expedited consideration under Streamlined Sales Tax Governing Board (SSTGB) Rule 902, subsection H.

Issue:

The issue is whether all or parts of a continuous glucose monitoring (CGM) system meet the SSUTA definition of prosthetic device or durable medical equipment (DME). The CGM system includes: (1) a single-use sensor probe, inserted under the skin and replaced weekly that contains an enzyme on the sensor which converts the glucose in tissue fluids into an electronic signal picked up by a reusable transmitter; (2) a reusable transmitter worn on the abdomen and attached to the probe which, at preprogrammed intervals measures and sends signals to a wireless receiver; (3) a wireless receiver which converts the signal to a glucose reading on the receiver screen display and which may be carried in the person's pocket or an optional carrying case; and (4) an optional clip/strap-on carrying case.

Facts:

Ms. Beaudeliare requests an interpretation that all four parts of the CGM system meet the SSUTA definition of "prosthetic device." The interpretive request states that the CGM is a system of devices some of which "…are worn on or in the body to support a person with a missing or malfunctioning pancreas by providing sensory cues to help them prevent physical malfunction of other organs and systems caused by episodes of hyperglycemia or hypoglycemia which can occur when the body's normal warning signals go undetected, such as is sometimes caused by central and autonomic nervous system dysfunction. Components (1) through (3) are all necessary for the system to function, as is item (4) when the person is on the go and has no pocket, to keep the receiver in close proximity to the Transmitter and the person to continually remain in use."

In the alternative, if the CGM system does not meet the definition of "prosthetic device," Ms. Beaudeliare requests an interpretation that the "[r]eceiver meets the definition of DME, because it may be placed near the body (in a purse, on a desk, etc.), as long as it stays within 20 feet of the Transmitter. Note: future CGM systems may offer a software app in lieu of a Receiver to enable the display of glucose levels on the person's existing smart-phone," But that software app is not yet available for general use and consideration of software app, is excluded from the Interpretive Request and this Interpretive Opinion recommendation.

The CGM operates as a system; however, because each component of that system has a different useful

life, each of the four items may be sold for a separate price and in separate transactions. At the initial sale, the sensor probe, the transmitter, and the wireless receiver are normally sold at the same time. The sensor probe, which attaches to the person's abdomen, has to be replaced weekly. The transmitter, which attaches to the sensor probe, lasts from three to six months. The receiver lasts for a year or more depending on the degree of wear and tear it goes through. The armband carrying case for the receiver is the only optional piece and is designed for active persons who participate in activities like jogging where the user's clothing has no pocket to securely carry the receiver; it has no other use.

Public Comment:

No written comments were submitted prior to the CRIC's meeting to discuss the interpretation request.

During the CRIC meeting, Ellen Thompson of Nebraska provided comments on the historical background concerning the prosthetic device definition. In particular, how the inclusion of orthotics and similar items influenced the current definition of prosthetic device.

In addition, Patricia Calore of Michigan inquired if the CGM system should be viewed as a single product rather than as separate products. If the four items in the system are viewed as a single product, separate purchases of the different CGM items might be purchases of repair or replacement parts for the system and treated for sales tax purposes in the same manner as the system purchase. After further discussion, the committee members concluded none of the items either alone or together constituted a prosthetic device because of their function. Moreover, these items could reasonably be separated with respect to the DME definition consistent with the current practice of separately identifying some DME products that are useful only when combined or used with other health care products.

Recommendation:

By a unanimous vote of the members present, the Compliance Review and Interpretations Committee (CRIC) submits to the Governing Board a recommendation that the interpretation proposed by the requestor not be accepted in part. The CRIC recommends that the Governing Board find that the single-use sensor probe and reusable transmitter are not defined under the Agreement and that the wireless receiver and carrying case meet the definition of DME.

The definition of a bundled transaction found in Appendix C of the Agreement specifically excludes transactions that contain durable medical equipment or medical supplies as one or more of the distinct and identifiable products if the seller's purchase price or sales price of the taxable tangible personal property is 50 percent or less of the total purchase price or sales price of the combined products; therefore, a purchase of the sensor probe, the transmitter, and the wireless receiver in a single transaction for one non-itemized price may or may not qualify as a bundled transaction depending on the mix of taxable and nontaxable products. As a result, tax treatment by states that do not tax or exempt all of these products in the same manner will be determined by each member state's law when the products are sold together for one non-itemized price.

Rationale:

1. Elements of prosthetic device not met.

Appendix C, Library of Definitions, Part II Product Definitions defines "prosthetic device" to mean "a replacement, corrective, or supportive device including repair and replacement parts for same worn on or in the body to:

A. Artificially replace a missing portion of the body;
B. Prevent or correct physical deformity or malfunction; or
C. Support a weak or deformed portion of the body."

Worn on the body:
The sensor probe and transmitter are worn in or on the body. The receiver is not worn in or on the body.

Replacement, corrective, or supportive device:
The sensor probe, transmitter, receiver monitor blood glucose levels and send an alert to the receiver if the glucose levels are out of range. The user will then review this information to determine if insulin is needed and decide whether to self administer insulin. The sensor probe, transmitter, and receiver act as diagnostic items. As such, none of these items artificially replace a missing portion of the body; prevent or correct physical deformity or malfunction; or support a weak or deformed portion of the body.

Accordingly, the sensor probe, transmitter, and receiver do not meet the requirements of A, B, or C of the definition of prosthetic device and so would not qualify as a prosthetic device, For similar reasons, the optional carrying case would not be a prosthetic device.

2. Receiver and carrying case are DME, while senor probe and transmitter are not defined.

Appendix C, Library of Definitions, Part II Product Definitions defines "durable medical equipment" to mean "equipment including repair and replacement parts for same, but does not include "mobility enhancing equipment," which:

A. Can withstand repeated use; and
B. Is primarily and customarily used to serve a medical purpose; and
C. Generally is not useful to a person in the absence of illness or injury; and
D. Is not worn in or on the body."

a. Sensor probe and transmitter
The sensor probe and transmitter when in use are physically attached and are worn in or on the body, and therefore, do not meet requirement D of the DME definition and so would not qualify as DME.

b. Receiver and an optional carrying case
The receiver can be used continuously for longer than a year to take repeated measurements over such time, and therefore, meets the requirement to withstand repeated use. The receiver is used to alert the user of abnormal glucose levels to help the user avoid a diabetic episode, meeting the medical purpose requirement. The receiver cannot be used for other purposes and would not be useful to a person that does not have diabetes, which might properly be characterized as an illness. Finally, during discussion it was determined that the receiver is not worn in or on the body; although, an optional carrying case is

available to allow such portability. Therefore, both the receiver and associated carrying case that is used only with the receiver would be DME.

Participating Committee Members:

Myles Vosberg, Tom Atchley, Dan Noble, David Steines and Tim Jennrich