

ALCON LABORATORIES, INC.  
6201 SOUTH FREEWAY  
FORT WORTH, TX 76134-2099,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 06-980

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **FINAL ORDER**

The Revenue Department assessed Alcon Laboratories, Inc. ("Taxpayer") for State use tax and local tax for June 2001 through May 2004. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on February 7, 2007. Steven DeRizzo represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer is located in Texas. It manufactures and sells contact lens cleaning solutions and various products used during surgeries, including five types of viscoelastic solutions. The Taxpayer sells the viscoelastic solutions to hospitals, surgical centers, etc. The solution is injected into the eye during cataract surgery to protect the corneal endothelium and the other intraocular tissues in the eye during the surgery. The solution is flushed or removed from the eye after the surgery is completed.

The Taxpayer did not collect sales or use tax on the viscoelastic solutions it sold at retail to its Alabama customers during the period in issue. The Department audited the Taxpayer and assessed it for use tax on those sales. The Department's position is based on a July 7, 1994 letter from a Department Supervisor concerning the taxability of Viscoat or Occucoat, which is also a type of viscoelastic solution. The letter reads in pertinent part:

It is my understanding that Occucoat is a solution used as a surgical aid in

anterior segment procedures including cataract extraction and intraocular lens implantation.

Section 40-23-4.1, Code of Alabama 1975 states: "The term 'drugs' shall include any medicine prescribed by physicians when the prescription is filled by a licensed pharmacist, or sold to the patient by the physician, for human consumption or intake." Occucoat does not meet the requirement for an exemption as a prosthetic appliance as it does not remain in the eye, nor the exemption as a prescription medicine because it does not have any medicinal qualities.

Section 40-23-4.1 exempts drugs from sales tax in Alabama. The term "drugs" is defined as "any medicine prescribed by physicians when the prescription is filled by a licensed pharmacist, or sold to the patient by the physician, for human consumption or intake."

In *Baptist Medical Centers v. State of Alabama*, 545 So.2d 45 (Ala. Civ. App. 1987), two hospitals purchased medicines that were subsequently dispensed by the hospitals' pharmacies to patients in the hospitals. The Court of Civil Appeals held that the medicines were exempt pursuant to §40-23-4.1.

The Taxpayer in this case sells the viscoelastic solutions to hospitals, surgical centers, etc. Viscoelastic solutions are federally controlled and regulated substances. Consequently, when a solution is required for a surgery, it must be ordered or prescribed by the physician performing the surgery. The solution is then dispensed by the pharmacy in the hospital, surgical center, etc. in which the surgery is being performed. As in *Baptist Medical Centers*, the §40-23-4.1 exemption applies; provided, that viscoelastic solution is a medicine, and that it is used for human consumption or intake, as required by §40-23-4.1.

"Medicine" is not defined by the Alabama revenue code, Title 40, Code of Ala. 1975. In such cases, a word must be given its normal, generally accepted meaning. *State v.*

*American Brass*, 628 So.2d 920 (Ala. Civ. App. 1993). The American Heritage College Dictionary, Fourth Ed., at 862, defines the term as “[a]n agent, such as a drug, used to treat disease or injury.” “Drug” is defined by the same source, at 431, as “[a] substance used in the diagnosis, treatment, or prevention of a disease.”

The viscoelastic solution in issue is a substance used in the treatment of eye disease, i.e., the removal of cataracts during surgery. The solution is thus a medicine as defined above.

The solution is also prescribed for human consumption or intake. The solution is not taken orally, but rather is injected into the eye during surgery. Section 40-23-4.1 does not, however, require that a medicine or drug must be taken orally. A variety of drugs or medicines are absorbed through the skin or administered or taken intravenously, rectally, or otherwise. The viscoelastic solution is consumed or taken by a human for purposes of the §40-23-4.1 exemption when it is injected into the patient’s eye during surgery.

The fact that the solution is flushed or washed out of the eye after surgery also is of no consequence. There is no requirement that a drug, once administered, must remain in the patient for a specified period of time, or at all.

The viscoelastic solutions in issue are drugs within the scope of §40-23-4.1 because they are medicines, they are prescribed by the physicians that perform the cataract surgeries, the prescriptions are filled by pharmacists in the hospitals, surgical centers, etc. where the surgeries are performed, and the solutions are prescribed or used for human consumption or intake. They are consequently exempt from sales and use tax.

The final assessments are voided.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered May 7, 2007.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.  
Steven DeRizzo  
Myra Houser  
Joe Cowen