



MEMORANDUM
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TO: South Carolina Dental Association

FROM: Jeff Z. Brooker, III

DATE: May 28, 2020

RE: South Carolina Sales and Use Tax / Amalgam Waste Separators and Fees for
Dental Amalgam Waste Management and Recycling
Our File No. 847-14-0138

The purpose of this Memorandum is to discuss the applicability of the South Carolina Sales and Use Tax to dentists practicing in South Carolina for their required amalgam recycling. Specifically, under 40 CFR §441, the United States Environmental Protection Agency (“EPA”) requires that, beginning on July 14, 2020, all dental offices must remove “dental amalgam solids from all amalgam process wastewater” (typically accomplished through the installation, operation, and maintenance of an “amalgam separator”).

The issue presents in two (2) parts:

1. First, is the delivery of a “free” amalgam separator by a dental amalgam waste management and recycling firm to a South Carolina Dental Association Member subject to sales or use tax as a retail sale of tangible personal property?
2. Second, are the services provided by a dental amalgam waste management and recycling firm subject to South Carolina sales or use tax?

BACKGROUND

By its Final Rule applicable to the prevention of discharge of dental amalgam in dental office wastewater (issued July 14, 2017), and under which reporting becomes required on July 14, 2020, the EPA states that, “The mercury collected by these separators can be recycled.” Executive Summary, Notice of Rulemaking, EPA, 82 FR 27154, 27155. The rule was established by the EPA to establish “technology-based pretreatment standards under the Clean

Water Act to reduce discharges of mercury from dental offices into municipal sewage treatment plants known as publicly owned treatment works (POTWs).” 82 FR 27154.

Also at Part III of the EPA rulemaking, the EPA provided that it “expects all of the collected amalgam will be recycled, rather than released back into the environment.” 82 FR 27157.

An amalgam separator is a device which is designed to capture amalgam particles from dental office wastewater through sedimentation, filtration, centrifugation, or a combination of these mechanisms. Dental amalgam is dental filling material used to fill cavities caused by tooth decay. It has been used for more than 150 years in hundreds of millions of patients around the world. Dental amalgam is a mixture of metals, consisting of liquid (elemental) mercury and a powdered alloy composed of silver, tin, and copper.

As a service for the dental industry, numerous businesses have offered to be the “agent” of the dentist for purposes of installing, maintaining and documenting the amalgam separators and the required records of the proper disposal of the dental amalgam. These dental amalgam waste management and recycling firms pick up or receive the separators to collect the dental amalgam waste for proper disposal in accordance with 40 CFR 261.5(g)(3), including the required maintenance of records (such as the name and location of the permitted or licensed treatment, storage or disposal facility receiving the amalgam retaining containers).

The amalgam separator is typically supplied to a dental office by a company such as DRNA (Dental Recycling North America) or Solmetex. These dental amalgam waste management and recycling firms will generally provide a dental office with its needed amalgam separators free of charge, but do charge for the collection, removal, recycling and reporting required by the EPA amalgam waste final rule (40 CFR §§441.10-.50).

The amalgam separator is a device used by a dentist in conjunction with the Final Order of the EPA for the purpose of preventing and/or abating water pollution by recycling the metals in dental amalgam waste (principally mercury) and it is required in order to continue to provide most dental services in a dentist’s office.

The Amalgam Separator Is NOT Subject to South Carolina Sales or Use Tax

By virtue of being a member of the South Carolina Dental Association (SCDA), a member may apply for and receive amalgam separators from either DRNA or Solmetex at little to no charge.

For purposes of the South Carolina Sales and Use Tax, a “retail sale” means “all sales of tangible personal property except those defined as wholesale sales. The quantity or sales price of goods sold is immaterial in determining if a sale is at retail.” SC Code §12-36-110. Against this definition, even if no purchase price is actually charged, the “value” of the transaction is subject to the South Carolina Sales and Use Tax unless an exemption from the tax applies.

Under SC Code §12-36-2120(17), there is an exemption from the South Carolina Sales and Use Tax for “machines used in manufacturing, processing, agricultural packaging, recycling, compounding, mining or quarrying tangible personal property for sale. This includes certain machines used to prevent or abate air, water or noise pollution caused by machines used in manufacturing, processing, recycling, compounding, mining, or quarrying tangible personal property for sale.” (*emphasis added*).

Thus, the amalgam separator should be exempt from South Carolina Sales and Use Tax because:

- a. It is a machine which is required by the EPA to capture the dental amalgam waste to prevent (or abate) water pollution
- b. The waste dental amalgam is recycled.
- c. The amalgam separator is integral and necessary for the proper practice of dentistry in the United States.

With regard to recycling, the exemption from the South Carolina Sales and Use Tax at §12-36-2120(17) also provides, “As used in this item ‘recycling’ means a process by which materials that otherwise would become solid waste are collected, separated, or processed and reused, or returned to use in the form of raw materials or products, including composting, for sale.” Companies such as Mercury Refining, LLC (located in New York state) state that, “In our over 50 years of experience in this field *many tons of silver and mercury have been recovered, purified and recycled to industrial and medical users.*” <http://mercuryrefining.com/dental-amalgam/> (*emphasis added*).

Therefore, the delivery of the dental amalgam separator by a business which installs, maintains and provides the required management and recycling records of the proper disposal of the dental amalgam waste is available for the “machine exemption” from the South Carolina Sales and Use Tax. The dental amalgam waste is captured by the separator to (i) prevent pollution, (ii) securing the waste to recycle metals and (iii) and it is integral and necessary to the proper provision of dental services.

**The Service of Collecting and Recycling Dental Amalgam Waste
From an Amalgam Separator Is NOT Subject to South
Carolina Use Tax Obligation on the South Carolina Dentist**

As a first consideration of this point, if the South Carolina Sales and Use Tax applies to the fees charged for the services provided by a dental waste management and recycler (such as DRNA and/or Solmetex), then it is quite likely that the duty to collect and pay over the tax applies to such dental waste management and recycler. In order to be subject to the South Carolina Sales and Use Tax, a retailer must have nexus. Nexus is understood to mean a “sufficient connection between a person and a state, and a sufficient connection between an activity, property, or transaction and a state, that allows the state to subject the person, and the activity, property, or transaction to its taxing jurisdiction.” SC Rev. Rul. 18-14.

At 2,000 members, and assuming that the industry uses an average of 2.7 amalgam separators at an estimated cost of \$800/year, and assuming that all dentists will comply with the EPA Final Order, the gross receipts for the industry of dental waste management and recycling in South Carolina is estimated to be over \$4,000,000.00. South Carolina requires (in light of the *South Dakota v. Wayfair* United States Supreme Court decision in 2018) that any remote seller of tangible property register in the state based on the following:

A remote seller (i.e., a retailer without a physical presence in South Carolina) whose gross revenue from sales of tangible personal property, products transferred electronically, and *services delivered into South Carolina exceeds \$100,000* in the previous calendar year or the current calendar year has economic nexus (i.e., substantial nexus) with South Carolina. A remote seller who has economic nexus with South Carolina is responsible for obtaining a retail license and remitting South Carolina sales and use tax. SC Rev. Rul. 18-14.

Based on the first consideration, that if the service is deemed subject to sales and use tax in South Carolina, such responsibility is on the dental waste management and recycling service provider following the *Wayfair* decision by the United States Supreme Court.

Notwithstanding the notion that if any South Carolina Sales and Use Tax is owed it will be the responsibility of the remote service provider to register, report, collect, and remit any such South Carolina Sales and Use Tax, it is useful to consider that there exists a second consideration - a proper argument is that dental waste management and recycling services are not subject to the South Carolina Sales and Use Tax.

Although the South Carolina Sales and Use Tax is applied to most all sales of “tangible personal property,” the tax also applies to certain services. The applicable statute provides:

*"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. **It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity,** the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service. SC Code §12-36-60 (emphasis added).*

Since the service charged is for the collection of dental amalgam waste to be recycled and ultimately resold and used (whether in the context of industrial or subsequent medical use), it appears that the fee charged by a company like DRNA or Solmetex should be exempt from the South Carolina Sales and Use Tax. That is, like the fee charged for professional services, the fee

charged by a dental waste management and recycler is to comply with the Final Rule promulgated by the EPA. Therefore, it is a fee incurred as the result of an order of a federal agency to comply with pollution prevention and/or abatement.

Although this specific matter has not come before the SCDOR, it does appear that in the SC Code of Regulations, there are somewhat parallel exemptions. For example, in the case of undertakers, the sales tax does apply to the sale of caskets, grave vaults and other like tangible personal property, but does *not* apply to “receipts accruing from the rendering of such services as embalming, hearse service, transportation of family, etc.” SC Code Regs. §117-309.8.

Also, in the case of businesses which rent or lease tangible personal property to a user (e.g., a ship), if the lessor provides a crew or otherwise provides personal services to properly use such rented tangible property, the separately invoiced services are exempt from the sales and use tax. SC Code Regs. §117-309.15.

And perhaps most akin to the dental waste management and recycler, “[r]eceipts of warehousemen from their services in storing, handling, packing, crating, delousing, etc., property for others are not subject to the sales tax.” SC Code Regs. 117-319. Because a dental waste management and recycler is collecting, storing, and moving the property for use by others (the end use recycler), the service charge to a South Carolina dentist for dental waste management and recycling should not be subject to the South Carolina Sales and Use Tax.

Therefore, based on the foregoing, it does not appear that dentists should be required to withhold any South Carolina Use Tax on payments made to any out of state dental waste management and recycling service provider for two (2) reasons:

First, if the service is deemed subject to the South Carolina Sales and Use Tax, it appears that the dental waste management and recycling service provider would be subject to tax in South Carolina.

Second, based on the law, the regulations, and the administrative guidance, the service provided by the dental waste management and recycling service provider should not be a service that is subject to the South Carolina Sales and Use Tax.