North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

July 3, 2018

[redacted]

Re: Request for a Written Determination Regarding Licensed Respiratory Therapists

Dear [redacted]

The North Carolina Department of Revenue (Department) is in receipt of the request for a written determination made on behalf of your company, [redacted] (Taxpayer) via letter dated April 9, 2018 along with the five hundred dollar fee. Please accept this letter as the Department's written determination in response to your inquiry whether licensed respiratory therapists are required to obtain an individual privilege license under North Carolina General Statute (N.C. Gen .Stat.) § 105-41. In making this written determination, the Department has considered the facts presented in your initial request as well as the supplemental information provided to the Department.

This written determination is issued under N.C. Gen. Stat. §§ 105-264 and 105-264.2 and applies the current tax law to a specific set of existing facts as furnished by the requesting Taxpayer. This written determination is applicable only to the Taxpayer addressed herein and as such has no precedential value except to the Taxpayer to whom the Department issues this determination.

The statement of facts submitted for the Department's consideration and an addendum seeking clarification and Taxpayer's responses thereto is as follows:

> Taxpayer has read the State of North Carolina Privilege License Tax Technical Bulletin (Rev November 2017). Taxpayer's interpretation of the Technical Bulletin is that a licensed respiratory therapist is not required to possess a Privilege License per section E (1): Professions and/or Businesses Requiring a Privilege License.
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> Taxpayer indicates they have spoken with a representative from the Department via telephone who also confirmed that a licensed respiratory therapist is not required to have a Privilege License.
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> Taxpayer seeks a written determination concluding that a licensed respiratory therapist is not required to obtain a Privilege License pursuant to North Carolina General Statute § 105-41 to prevent future actions against any employees not possessing this license.

Written Determination Addendum

Based on the limited information provided in the initial request for written determine, the Department sought additional clarifying information from Taxpayer.

Department's Clarifying Questions:

1. Define the duties of your respiratory therapists
   - **Response:**
     - Provides respiratory care to patients per physician orders and established policies and procedures.
     - Participates in the development and/or implementation of patient care plans.
     - Performs routine cleaning and maintenance of respiratory supplies and equipment.
     - Communicates operational issues to the Department Manager/Supervisor in a timely manner.
     - Assures compliance with federal, state, and local technical and professional regulations and accepted practiced guidelines.
     - Assists in the orientation and training of new employees and students.
     - Maintains and promotes good customer relations; communicates with management, coworkers, facility staff, patients, patients' family members, and other caretakers in a professional manner.
     - Provides instruction to patients and other caretakers in the methods and objectives of therapy.
     - Prepares and updates patient records accurately.

2. Are the respiratory therapists salaried employees or are they independent contractors?
   - **Response:** The therapists are hourly waged employees that work for Taxpayer

3. Do the respiratory therapists work under the orders and direction of a registered physician?
   - **Response:** The therapists work under the orders and direction of a licensed physician

Issue(s):

Whether Taxpayer's licensed respiratory therapists are required to have a North Carolina Privilege License pursuant to North Carolina Gen. Stat. § 105-41

Department's Response:

North Carolina Gen. Stat. § 105-41(a)(2) provides in part, that a "…*person who practices a professional art of healing*" (emphasis added), must procure from the North Carolina Department of Revenue (Department) a statewide privilege license and pay for such license a tax of fifty dollars ($50.00) annually. While the occupation of "respiratory therapist" is not specifically listed in N.C. Gen. Stat. § 105-41(a)(2), a "respiratory therapist" does practice the "professional art of healing."

The North Carolina Court of Appeals has defined the terms "professional art" and "healing" as they pertain to the privilege license requirement. In the case of *Smith v. Keator*, the North Carolina Court of Appeals determined that for purposes of North Carolina Gen. Stat. § 105-41, the term "professional" art meant a skill requiring "knowledge of advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study." *Smith v. Keator*, 21 N.C. App. 102, 105 (1974), citing *Paterson v. University of the State of New York*, 14 N.Y.2d. 432, 437 (1964). The Court also defined "healing" to mean, "the curing of diseases or injuries". *Smith v. Keator*, 21 N.C. App. 102, 105 (1974).

In North Carolina, pursuant to N.C. Gen. Stat. § 90-647, the practice of respiratory care requires mandatory licensure. This licensing requirement includes verification of the successful completion of a respiratory care education program, basic cardiac life support, as well as an entry-level examination given by the National Board for Respiratory Care, Inc. Further, per N.C. Gen. Stat. § 90-648, the practice of respiratory care includes skills such as "observing and monitoring signs and symptoms, general behavior, and general physical response to respiratory care treatment and diagnostic testing, including the determination of whether such signs, symptoms, reactions, behavior, or general response exhibit abnormal characteristics…" as well as performing diagnostic testing and other therapeutic applications, all of which are performed pursuant to the written order of a licensed physician. Based on the required knowledge and skills to practice respiratory care and the diagnostic and therapeutic nature of the work, the Department concludes licensed respiratory therapists are engaged in the professional art of healing.

However, North Carolina Administrative Rule, 17 NCAC 04B .0610, discusses when the privilege license tax is applicable to physical therapists, stating: "[a] physical therapist who works only under the orders and direction of registered physicians and does not attempt to diagnose and independently apply physical therapy is not subject to privilege license under G.S. 105-41; however, persons who independently apply physical therapy for a reward are practicing the art of healing and are therefore subject to privilege license." While this Administrative Rule is specific to physical therapists, it is the Department's position that the same intent would apply to licensed respiratory therapists.

Therefore, based upon the facts as articulated above, the Department concludes that a licensed respiratory therapist is not required to obtain a privilege license pursuant to North Carolina Gen. Stat. § 105-41 if he/she works only under the orders and direction of registered physicians.

This written determination is limited to licensing requirements by the Department, and the Department will not issue any opinion addressing any other licensing requirements for which you or your business may be subject.

This written determination is solely based on the facts described in the statement of facts submitted to the Department for consideration of the transactions described. If the facts and circumstances described are not accurate or if there are other facts not previously disclosed that may result in the Department reaching a different conclusion, this written determination may not be relied upon. If a taxpayer relies on this written determination and the Department discovers, upon examination, that the facts situation of the taxpayer is different in any material aspect from the facts and circumstances presented for consideration, the written determination will not afford the taxpayer any protection from adverse tax consequences. A

written determination is not equivalent to a Technical Advice Directive that generally affects a large number of taxpayers. A written determination has no binding effect on the Department with regard to any person other than the taxpayer who requested and received the determination. It should be noted this document shall not be cited or relied upon as precedent and that a change in statute, regulation, or case law could void this determination.

I hope this clarifies for you the issue of the privilege license tax as it relates to licensed respiratory therapists working for Taxpayer. If I can be of further assistance, please do not hesitate to let me know.

Yours Respectfully,

[redacted]
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cc: [redacted] Director, Excise Tax Division