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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 20, 2022 Session

**EISAI, INC. v. DAVID GERREGANO, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE**

**Appeal from the Chancery Court for Davidson County
No. 19-805-IV Russell T. Perkins, Chancellor**

No. M2021-01408-COA-R3-CV

The issues on appeal involve the assessment of state business taxes against a pharmaceutical company that stored and sold its products from a warehouse in Memphis, Tennessee. The trial court granted summary judgment to the taxpayer, Eisai, Inc. (“Eisai”), on the ground that its pharmaceutical sales were not subject to business tax because the pharmaceuticals did not constitute “tangible personal property” as the term is defined in Tennessee Code Annotated § 67-4-702(a)(23), which exempts products that are “inserted or affixed to the human body” by physicians or “dispensed . . . in the treatment of patients by physicians.” The Department of Revenue (“the Department”) appeals. We affirm the judgment of the trial court, but also rule in favor of Eisai on a different ground raised in the trial court and on appeal. In order to prevail in this case, the Department must establish that Eisai made “wholesale sales” to “retailers,” as distinguished from “wholesaler-to-wholesaler” sales, the latter of which are exempt from business tax. The undisputed facts reveal that Eisai’s sales were “wholesaler-to-wholesaler” sales. Accordingly, Eisai’s sales were not subject to business tax. As such, Eisai need not establish that the exception in § 67-4-702(a)(23) applies. Nevertheless, if Eisai’s sales to its distributors are within the scope of the business tax, we affirm the trial court’s ruling that Eisai’s sales are exempt under Tennessee Code Annotated § 67-4-702(a)(23). For these reasons, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed as Modified**

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which W. NEAL MCBRAYER and JEFFREY USMAN, JJ., joined.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Joseph R. Longenecker, Assistant Attorney General, for the appellant, David Gerregano, Commissioner of Revenue, State of Tennessee.

Brett R. Carter, Nashville, Tennessee, and Clark Calhoun, Atlanta, Georgia, for the appellee, Eisai, Inc.

OPINION

FACTS AND PROCEDURAL HISTORY

At issue in this action is the assessment of state and municipal business tax by the Tennessee Department of Revenue (“the Department”) against Eisai, Inc. (“Eisai”) for the tax period of April 1, 2010 through March 31, 2016. Because the trial court’s Final Order provides a clear and concise statement of the relevant facts, which are not in dispute, we quote the trial court’s order, in relevant part, as follows:

Eisai, Inc. is a Delaware corporation with its headquarters located in Woodcliff Lake, New Jersey. Eisai is a health care company that discovers, develops, manufactures, markets, and sells pharmaceutical products in the United States. During the tax period of April 1, 2010 through March 31, 2016 (“the tax period”), Eisai maintained manufacturing operations in Maryland and North Carolina with most of its operations for commercial, home office, and research and development purposes conducted through locations in New Jersey, Massachusetts, and Pennsylvania and through foreign affiliates located in Japan. Eisai does not maintain a place of business in Tennessee. Once manufactured, Eisai’s pharmaceutical products are distributed through a network of wholesale pharmaceutical distributors. For business tax purposes, the Department of Revenue (“the Department”) classified Eisai as a seller of prescription drugs under Classification 2(D) as defined in Tenn. Code Ann. § 67-4-702(2)(D).

Eisai is registered as a manufacturer with the Tennessee Department of Health. Eisai is not subject to ad valorem taxation in Tennessee. Eisai pays ad valorem personal property tax to various local jurisdictions in states other than Tennessee in which Eisai maintains business locations and manufacturing facilities, including New Jersey, Maryland, Pennsylvania, Massachusetts, and North Carolina.

Eisai’s Products and Distribution

During the tax period, Eisai manufactured and sold prescription pharmaceuticals for oncology and neurology treatment. The pharmaceuticals manufactured by Eisai are dispensed pursuant to prescriptions issued by medical professionals. Eisai’s prescription pharmaceuticals are dispensed either through intravenous injection, syringe, capsules, or, in some instances, creams. For intravenously dispensed pharmaceuticals, a patient would visit a

clinic to have the drug directly delivered into a vein. For drugs dispensed through a syringe, capsule or cream, those prescriptions may be administered or dispensed either at a clinic or another location, including a patient's home.

During the tax period, Eisai sold its prescription drugs from a Memphis warehouse to seven customers. Of those seven, the Department's audit focused on Eisai's sales to three customers: Cardinal Health 108, Inc. ("Cardinal"), McKesson Specialty Care Distribution Corporation ("McKesson"), and McKesson Plasma and Biologics ("McKesson Plasma") (collectively, "the Specialty Distributors"). Eisai's sales to its other four customers - Cardinal Health, Inc., McKesson Drug Company, Metro Medical Supply, and Pfizer, Inc. - were considered "wholesaler to wholesaler" sales and were not included in gross sales when calculating the business tax.

For sales of prescription pharmaceuticals during the tax period, Eisai contracted with UPS Supply Chain Solutions, Inc. ("UPS") for warehouse space in Memphis, through a service agreement ("the Agreement") that required UPS to hold Eisai's products in inventory and to ship the products to Eisai's customers at Eisai's direction. Under the Agreement, Eisai retained title to its inventory of products being held in the warehouse. All the products Eisai sold to the Specialty Distributors were shipped from the Memphis warehouse.

After manufacture, Eisai's pharmaceutical products are shipped to the Memphis UPS facility and stored at the facility awaiting distribution. When the products leave the Memphis warehouse, they are shipped by UPS to the Specialty Distributors, all of which maintain warehouse facilities in LaVergne, Tennessee. The Specialty Distributors then sell Eisai's products directly to doctors, clinics, and specialty physicians, who in turn use the drugs to treat their patients. The prescription drugs sold by Eisai to the Specialty Distributors are used to treat cancer, the side effects of chemotherapy, and blood clots, as well as other related conditions.

Eisai entered into agreements with its customers to provide for the distribution of Eisai's pharmaceutical products. Under these distribution agreements, the distributors were only authorized to sell Eisai's drugs to purchasers who were licensed by a state pharmacy board or other state agency to sell or dispense prescription pharmaceutical products. The Specialty Distributors distributed to licensed medical practices, clinics, and hospital pharmacies that were licensed by a state pharmacy board or other state agency to sell or dispense prescription pharmaceutical products.

Distributors

Under the Federal Drug Administration's ("FDA") licensure reporting requirements, the Specialty Distributors are licensed as wholesale drug distributors. Similarly, the Tennessee Department of Health lists the Specialty Distributors as wholesale distributors on its website. The Specialty Distributors are accredited in Tennessee by the National Association of Boards of Pharmacy ("NABP") as wholesale distributors. Additionally, Eisai contacted the Specialty Distributors' tax departments to determine their status for Tennessee business tax purposes, and the Specialty Distributors informed Eisai that they were classified as wholesalers for purposes of Tennessee business tax.

Audit

The Department started a business tax audit of Eisai in 2017. The Department concluded that the Specialty Distributors were retailers for business tax purposes and were selling to end users. The Department classified Eisai's other distributors as wholesalers for business tax purposes. The Department cited Tenn. Comp. R. & Regs. 1320-04-05-.20 in making its determination that Eisai was a wholesaler.

Following the audit, the Commissioner issued a Proposed Notice of Assessment of business tax for the tax period, dated April 12, 2018, in the total amount of \$1,843,164.34. On March 4, 2019, the proposed assessment became final in accordance with Tenn. Code Ann. § 67-1-1438(c). The amounts of the assessment at issue are:

State Business Tax (County): \$572,311.00 (tax) + \$143,077.00
(penalty) + \$206,194.17 (interest) = \$921,582.17 (total)

Municipal Business Tax: \$572,311.00 (tax) + \$143,077.00
(penalty) + \$206,194.17 (interest) = \$921,582.17 (total)

Interest continues to accrue on the assessment pursuant to Tenn. Code Ann. § 67-1-801(a)(2).

Eisai did not file business tax returns with the Department or pay business tax in Tennessee during the tax period based on its interpretation of the holding in *Pfizer, Inc. v. Johnson*, No. M2004-00041-COA-R3-CV, 2006 WL 163190, at *1 (Tenn. Ct. App. Jan. 23, 2006). The Commissioner imposed a 25% delinquency penalty because Eisai was not registered for business tax in Tennessee and failed to file business tax returns during the tax period.

After the assessment, Eisai requested an informal conference pursuant to Tenn. Code Ann. § 67-1-1438(b). The informal conference was held on August 20, 2018. After the informal conference, the Department upheld the assessment in full in a letter dated April 4, 2019, and the assessment became final. Eisai commenced the instant lawsuit on July 3, 2019 to protest the assessment of the Tennessee business tax levied against it by the Department. On August 7, 2019, the Department filed its Counterclaim, seeking a judgment in the total amount of the assessment (\$1,843,164.34) together with accruing statutory interest, as well as attorney's fees and expenses pursuant to Tenn. Code Ann. § 67-1-1803(d).

In its complaint, Eisai contended that the Department incorrectly determined that Eisai's sales to the Specialty Distributors were subject to the business tax because the sales were non-taxable wholesaler-to-wholesaler sales. Alternatively, Eisai relied upon Tennessee Code Annotated §67-4-702(a)(23) to contend that its sales to the Specialty Distributors were exempt from the business tax because they are dispensed in the treatment of patients. Eisai also raised a separate constitutional argument for setting aside the assessment. It argued that the business tax, specifically Tennessee Code Annotated §67-4-712(b)(2), violates the Commerce Clause of the United States Constitution by providing an exemption for Tennessee manufacturers to the exclusion of out-of-state manufacturers.

In its answer and countercomplaint, the Department contended that the Specialty Distributors were acting as retailers for business-tax purposes, not wholesalers; thus, Eisai's sales were subject to the business tax. It also contended that the "treatment of patients" language in Tennessee Code Annotated § 67-4-702(a)(23) does not create a business tax exemption and that the "treatment of patients" language in the statute was only intended to establish medical service providers as end-users. Further, the Department argued that Eisai was ineligible for the manufacturing exemption; therefore, it lacks standing to challenge its constitutionality of Tennessee Code Annotated § 67-4-702(a)(23).

Each party then filed a motion for summary judgment. The trial court granted Eisai's motion, while denying the Department's motion. In doing so, the trial court found that Tennessee Code Annotated § 67-4-702(a)(23) exempts Eisai's prescription drug sales from business tax because such medications are not "tangible personal property," stating:

Because the pharmaceutical products Eisai sold to the Specialty Distributors are "inserted or affixed to the human body" or "dispensed . . . in the treatment of patients" by physicians, these pharmaceutical products do not constitute "tangible personal property." Tenn. Code Ann. § 67-4-702(23). Because sales subject to business tax are sales of tangible personal property, the pharmaceutical products Eisai sold to its Specialty Distributors are expressly exempted from business tax, regardless of whether the sales are classified as

wholesale sales or retail sales. *See* Tenn. Code Ann. § 67-4-702(16), (18)(A)(i), (23) & (26)(A). To paraphrase the Department, no one can be a seller of something that, for business tax purposes, cannot be sold.

Accordingly, the Court determines that Eisai's sales to the Specialty Distributors of its pharmaceutical products that are "inserted or affixed to the human body" or "dispensed . . . in the treatment of patients" by physicians are exempt from business tax. Tenn. Code Ann. § 67-4-702(23). As such, the Court determines that the Department's Assessment of business tax on Eisai's sales to the Specialty Distributors during the tax period is improper and must be fully abated.

(Footnotes omitted).

The trial court deemed the other issues moot, including Eisai's constitutional challenges and the Department's prayers for interest and attorney's fees, based upon its decision to abate the business tax assessed by the Department of Revenue. Following the entry of a final judgment, this appeal by the Department followed.

STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary judgment *de novo* without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Id.*; *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). In so doing, we accept the evidence presented by the nonmoving party as true, consider the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Tenn. R. Civ. P. 56 permits any party to move for summary judgment regardless of whether that party is the plaintiff or the defendant. *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 82 (Tenn. 2010). Thus, the courts are sometimes confronted with cross-motions for summary judgment. *Id.* "Cross-motions for summary judgment are no more than claims by each side that it alone is entitled to a summary judgment." *Id.* at 83. (citing *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir.1968)). "In practice, a cross-motion for summary judgment operates exactly like a single summary judgment motion." *Id.* (citing 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.10[6], at 56–85 to –86 (3d ed. 2009)).

Summary judgments are appropriate in virtually any civil case that can be resolved on the basis of legal issues alone. *B & B Enters. of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 844 (Tenn. 2010); *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn.

1997). “Because legal disputes involving the payment of taxes are frequently based on stipulated facts, they generally lend themselves to disposition by summary judgment as issues of law.” *CAO Holdings, Inc.*, 333 S.W.3d at 81. Moreover, “the well-understood principles generally governing the review of summary judgments are equally applicable to summary judgments in proceedings involving tax disputes.” *Id.* (citing *BellSouth Adver. & Publ’g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn.2003)).

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. “The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Martin v. Norfolk S. R.R. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). In the case at bar, it is agreed that the material facts are not in dispute.

ANALYSIS

On appeal, the Department contends it properly assessed business tax against Eisai because Eisai’s customers, the Specialty Distributors, were retailers that resold the pharmaceutical products to end-user medical professionals. The Department also contends the trial court erred in concluding that the sales were exempt from the business tax because the pharmaceutical products Eisai sold to its customers were not “tangible personal property” under Tennessee Code Annotated § 67-4-702(a)(23) at the time of those sales.

For its part, Eisai contends the trial court correctly held that Tennessee Code Annotated § 67-4-702(a)(23) exempts Eisai’s prescription drugs from the business tax. In the alternative, Eisai argues that if Section 67-4-702(a)(23) only exempts a physician’s sale of drugs dispensed in the treatment of patients and does not exempt Eisai’s sales of those drugs, its sales are non-taxable wholesaler-to-wholesaler sales.

In conducting our analysis, we adhere to longstanding principles of statutory construction, most recently relied upon by this court in *Bearing Distributors, Inc. v. Gerregano*:

When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507

(Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but “should be construed, if practicable, so that its component parts are consistent and reasonable.” *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that “would render one section of the act repugnant to another” should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

In re Estate of Tanner, 295 S.W.3d at 613-14. Specifically concerning tax statutes, our Supreme Court has elucidated:

In addition to general principles of statutory construction, we must also consider the rules of construction specifically applicable to tax statutes. Statutes imposing a tax are to be construed strictly against the taxing authority. *See Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992). However, statutes granting exemptions from taxation are construed strictly against the taxpayer. *Tibbals Flooring Co. v. Huddleston*, 891 S.W.2d 196, 198 (Tenn. 1994); *Covington Pike Toyota*, 829 S.W.2d at 135.

Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004).

No. M2020-01075-COA-R3-CV, 2022 WL 40008, at *5 (Tenn. Ct. App. Jan. 5, 2022).

I. Wholesaler-to-Wholesaler Sales

Eisai contends that its sales to its Specialty Distributors were non-taxable wholesaler-to-wholesaler sales, regardless of whether Tennessee Code Annotated § 67-4-702(a)(23) exempts Eisai’s receipts from the sale of drugs dispensed in the treatment of patients. Further, Eisai contends the Department cannot establish that Eisai made taxable wholesale sales, especially in light of the fact that the relevant taxing statute must be construed against the taxing authority. *See Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (“Statutes imposing a tax are to be construed strictly against the taxing authority.”). More specifically, Eisai contends that the Department cannot prove that its sales to its Specialty Distributors were “wholesaler” to “retailer” sales.

For its part, the Department recognizes the existence of the wholesaler-to-wholesaler exemption. *See Pfizer, Inc. v. Johnson*, No. M2004-00041-COA-R3-CV, 2006 WL 163190 (Tenn. Ct. App. Jan. 23, 2006). It contends, however, that the Specialty Distributors functioned as retailers, not wholesalers, because the Specialty Distributors sales constituted the final retail sale to the end-user medical professionals who administered the drugs as part of their treatment of patients. Thus, the dispositive question is whether the Specialty Distributors or their customers—the medical providers—functioned as the “retailers” in the chain of events.

The statutory definitions at issue here, all of which are codified under Tennessee Code Annotated § 67-4-702(a), provide in relevant part:

(16) **“Retail sale” or “sale at retail” means any sale other than a wholesale sale;**

(17) **“Retailer” means any person primarily engaged in the business of making retail sales.** For purposes of this subdivision (a)(17), “primarily” means that at least fifty percent (50%) of the taxable gross sales of the business are retail sales[.]

. . . .

(B) **“Sale” does not include the transfer of tangible personal property from a wholesaler to another wholesaler** or from a retailer to another retailer where the amount paid by the transferee to the transferor does not exceed the transferor’s cost including freight in and storage costs, and transportation costs incurred in the transfer from the transferor to the transferee;

. . . .

(23) **“Tangible personal property” means and includes personal property that may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. “Tangible personal property” does not include stocks, bonds, notes, insurance or other obligations or securities, nor does it include any materials, substances or other items of any nature inserted or affixed to the human body by duly licensed physicians or dentists or otherwise dispensed by them in the treatment of patients;**

. . . .

(26)(A) “Wholesale sale” or “sale at wholesale” means any sale to a retailer for resale; . . .

(27) “Wholesaler” means any person primarily engaged in the business of making wholesale sales. For purposes of this subdivision (a)(26), “primarily” means that more than fifty percent (50%) of the taxable gross sales of the business are wholesale sales.

(Emphasis added).

For its part, Eisai contends that it is undisputed that the material evidence supports one conclusion:

that Eisai’s distributors were “wholesalers” who purchased life-saving prescription drugs from Eisai for the purpose of—and with a requirement to—resell those drugs to licensed medical facilities (mostly clinics and physician oncology practices), drug dispensers (*e.g.*, retail pharmacies), and hospitals to be resold and dispensed by those retail medical facilities to patients.

In support of this conclusion, Eisai relies on the language in its distribution agreements with the Specialty Distributors pursuant to which the Specialty Distributors were required to sell to “Customers,” a term defined in the distribution agreements, who were resellers and who were not permitted to sell directly to patients. As Eisai further explains in its brief:

The agreements permit sales only to “Customers,” which was defined to mean purchasers who had “been licensed by a state pharmacy board or similar state agency to sell and/or dispense prescription pharmaceutical products.” (citation omitted). Each of the Specialty Distributors agreed to certain payment and pricing terms; agreed not to divert or overstock drugs; and agreed to satisfy certain data requirements related to inventory in their “Distribution Centers,” which were defined as facilities where the purchasers would “receive[], store[], and/or distribute[] Product . . . for resale in the Territory.” (citation omitted). Those agreements also defined the charges for goods and services between the parties by reference to the “wholesale acquisition cost.” In summary, the Specialty Distributors were barred from selling directly to the ultimate consumers (*i.e.*, the patients) and instead sold to licensed clinics, practices, pharmacies, and hospitals that were contractually required to resell Eisai’s drugs to those ultimate consumers under agreements that defined the price charged by Eisai by reference to “wholesale acquisition cost.”

(Citations omitted).

Finally, Eisai relies on both the Food and Drug Administration (“FDA”) and Department’s definitions of “wholesaler” and “wholesale.” For example, it notes that the Specialty Distributors are treated as “wholesalers” for numerous regulatory and licensing purposes. Under the FDA’s licensure reporting, each of its Specialty Distributors are licensed as a “WDD”—*i.e.*, “wholesale drug distributor.” Eisai further relies on the fact that Federal law defines “wholesale distribution” as the “distribution of prescription drugs to persons other than a consumer or patient,” with certain exclusions (*e.g.*, for intracompany sales and purchases by members of a group purchasing organization (GPO) from the GPO or other members of the GPO. In support of this contention Eisai cites 21 C.F.R. 203.3(cc). It also relies on the fact that federal law, specifically 21 C.F.R. 205.4, adds that “[e]very wholesale distributor in a State who engages in wholesale distributions of prescription drugs in interstate commerce must be licensed by the State licensing authority. . . .” Further, and as stated in its brief, Eisai relies on the undisputed fact that the Specialty Distributors were licensed as a “wholesale/distributor” by the Tennessee Department of Health during the audit period.

The crux of the Department’s contention, as set forth in its brief, reads in pertinent part:

Because of the wholesaler-to-wholesaler exemption, there will generally be two incidents of business taxation in any supply chain in which a good is sold more than once (barring exemptions): first, the last sale by a wholesaler to a retailer (as opposed to any number of previous wholesaler-to-wholesaler sales up the chain); and second, the final retail sale to the end-user of the product (of which there can be only one). Because the retail sale is the sale made to the end-user, the identity of the end-user of the product controls the characterization of every sale in any supply chain. The entity that sells to the end-user is the retailer; the entity that sells to the retailer is a wholesaler making a wholesale sale; and any sellers further up the chain are making wholesaler-to-wholesaler sales that are not taxable under *Pfizer*.

Eisai’s sales of prescription drugs to the Specialty Distributors, however, were different. Eisai sold products to the Specialty Distributors, which resold the products to medical-service providers who administered the drugs to their patients. Those medical-service providers were not *reselling* the pharmaceuticals, as CVS did in the Metro illustration. They were *using* those products in their provision of services to patients, which makes them end-users and, as a result, necessarily makes the Specialty Distributors retailers.

The Department's contention that the Specialty Distributor sales to the medical professionals were retail sales is based, in principal part, on the following:

Treating someone who uses products in the performance of their services as the end-user is not an unusual concept in Tennessee tax law. Under the business tax, “[s]ales to a contractor who in the course of performing his contract installs property or uses services in a structure, as a component part thereof, are retail sales to a user or consumer.” Tenn. Comp. R. & Regs. 1320-04-05-.47(5) (“Rule 47”).¹ This same concept in the sales-tax context has been well established for decades. *See, e.g., Townsend Electric Co. v. Evans*, 193 Tenn. 536, 540-42, 246 S.W.2d 967, 969 (1952) (holding that a contractor purchasing supplies for the execution of a building contract was “not a seller of the tangible personal property incorporated into the contract, but is a user of such property”); *Wylie Steel Fabricators, Inc. v. Johnson*, 179 S.W.3d 509, 519-20 (Tenn. Ct. App. 2005) (quoting *Townsend Electric* and citing a line of similar cases with approval).

The contractor-dealers in *Townsend Electric*, *Wylie Steel*, and related cases are the equivalent of the Specialty Distributors' medical-service-providing customers. Like the contractor-dealers in these cases and the contractors operating under Rule 47, the medical-service providers administering Eisai products to patients were selling medical *services* and using the drugs themselves in the course of performing those services. This characterization controls the nature of every other sale in the supply chain and renders Eisai a wholesaler selling its products to Specialty Distributor *retailers*.

Although the Department's argument is, at first blush, persuasive, it ignores the legislative intent expressed through Section 67-4-702(a)(23)—that patients, not medical professionals, are the “end-users” of the drugs. To read this section of the statute as the Department suggests would strip Section 67-4-702(a)(23) of any purpose, which directly conflicts with this court's duty to “presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing.” *Bearing Distributors, Inc.*, 2022 WL 40008, at *5 (quoting *In re C.K.G.*, 173 S.W.3d at 722). Thus, for us to conclude that the Specialty Distributors were the final retailers in the chain, and therefore conclude that Eisai's sales to those Specialty Distributors did not constitute a “wholesale sale” as defined in Tennessee Code Annotated § 67-4-702(a)(26)(A), would require us to ignore the legislative intent as expressed in Tennessee Code Annotated § 67-4-702(a)(23)—that the medical professionals are the final retailers and the patients are the end-users. The fact that the “sale” by the medical providers

¹ In its brief, the Department included a footnote that read: “The Department of Revenue's business tax rules were extensively revised after the relevant tax period here. The version of the rules in effect as of March 31, 2016, were filed in the trial court under a declaration from a Department official.”

to the patients are tax exempt under the Business Tax Act does not negate the fact that the legislature recognized the transaction as a sale, indeed, the final retail sale to the end-user of Eisai's products.

Finally, we acknowledge the Department's contention that in order to determine whether Eisai's sale are "wholesaler-to-wholesaler" sales under Tennessee Code Annotated § 67-4-702, it is necessary to consider whether Eisai's drugs constitute "tangible personal property" under the same section. We, however, have concluded that we need not decide whether Eisai's drugs constitute "tangible personal property" because the statutory definition of the term "sale" includes not only the transfer of title or possession to "tangible personal property," but the furnishing of any of the *things* or services taxable under this part." See Tenn. Code Ann. § 67-4-702(a)(18)(A)(i), (iii) (emphasis added).

When dealing with statutory interpretation, our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. See *Bearing Distributors, Inc.*, 2022 WL 40008, at *5 (citing *Houghton*, 90 S.W.3d at 678). It is clear that the legislative intent in enacting Section 67-4-702(a)(23) was to recognize that the medical professionals' utilization of Eisai's drugs during the treatment of their patients constitutes the final retail transaction in the supply chain. Therefore, Eisai's sales to its Specialty Distributors were non-taxable "wholesaler-to-wholesaler" sales.²

II. Tennessee Code Annotated § 67-4-702(a)(23)

Although we hold that Eisai's sales to the Specialty Distributors are non-taxable "wholesaler-to-wholesaler" sales, in the interest of judicial economy, we shall also address the issue upon which the trial court rendered its decision: whether Eisai's drug sales were exempt from business tax under Tennessee Code Annotated § 67-4-702(a)(23).

Relying on the definition of tangible personal property in Tennessee Code Annotated § 67-4-702(a)(23), the trial court held that Eisai's prescription drugs are exempt from business tax. In its analysis of this issue, the trial court framed the issue as "whether, by its terms, the Business Tax Act applies to sales made by Eisai to the Specialty Distributors located in Tennessee." After identifying the applicable principles for statutory construction, the trial court noted that the Business Tax Act is a component of Tennessee's privilege and excise tax, "a tax on the privilege of conducting certain business activities in Tennessee," which is in lieu of ad valorem taxes on the inventories of merchandise held for sale or exchange by persons taxable under the Business Tax Act." The trial court also noted that "Eisai does not manufacture its products in Tennessee. Thus, it is undisputed

² Although the trial court granted summary judgment on the basis of Tennessee Code Annotated § 67-4-702(a)(23), this court may affirm the trial court's decision when rendered on different grounds. See *Collier v. Legends Park LP*, 574 S.W.3d 356, 361 (Tenn. Ct. App. 2018); see also *Hill v. Lamberth*, 73 S.W.3d 131, 136 (Tenn. Ct. App. 2001); *Wood v. Parker*, 901 S.W.2d 374, 378 (Tenn. Ct. App. 1995).

that Eisai's dominant business activity in Tennessee is selling pharmaceutical products from the UPS warehouse in Memphis." Then the trial court noted that Eisai's sales of its pharmaceutical products from the Memphis warehouse creates "a sizeable economic connection between Eisai and Tennessee. Thus, Eisai's use of the Memphis warehouse creates 'sufficient local incident' to allow for taxation for that location."

The trial court then focused on the fact that the Business Tax Act draws a distinction between "wholesale sales" and "retail sales" and that both consist of selling "tangible personal property" for consideration. As the trial court explained:

"Wholesale sale" means "any sale to a retailer for resale[.]" Tenn. Code Ann. § 67-4-702(26)(A), whereas a "retail sale" means "any sale other than a wholesale sale[t Tenn. Code Ann. § 67-4-702(16). The operative word here is "sale," which is defined in relevant part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of *tangible personal property* for a consideration[.]" Tenn. Code Ann. § 67-4-702(18)(A)(i) (emphasis in original). Thus, both wholesale sales and retail sales consist of selling "tangible personal property" for consideration.

"Tangible personal property" means "personal property that may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses[.]" but it does not "include any materials, substances or other items of any nature inserted or affixed to the human body by duly licensed physicians . . . or otherwise dispensed by them in the treatment of patients[.]" Tenn. Code Ann. § 67-4-702(23). Therefore, the sale of materials, substances or other items inserted or affixed to the human body by a licensed physician "or otherwise dispensed by them in the treatment of patients" does not constitute a sale subject to business tax under the Business Tax Act. *Id*; see also Department's Reply, p. 4 ("[T]he business tax statutes exclude medicine dispensed by medical professionals in the treatment of patients from the definition of 'tangible personal property' in the business tax, and thus from both 'sale' and 'resale.'"). This conclusion is in keeping with the Department of Revenue's guidance "that the sales of materials inserted or affixed to the human body or dispensed in the treatment of patients by physicians . . . are exempt from business tax." Tennessee Tax Quarterly, Vol. 4, No. 3 (July 1, 1984).

The parties do not dispute that the pharmaceuticals Eisai sold to the Specialty Distributors are drugs that are administered directly to the patient by the healthcare provider. In fact, the Specialty Distributors were created to serve the medical service provider market that administers infused drugs and other medicines requiring sophisticated dispensation methods overseen by medical

professionals. *See* Department’s Response, p. 18. The medical service providers who bought these drugs from the Specialty Distributors inserted or affixed them to the human body or dispensed them in the course of treating their patients. These pharmaceuticals were used by physicians in the course of providing medical services to their patients.

Because the pharmaceutical products Eisai sold to the Specialty Distributors are “inserted or affixed to the human body” or “dispensed ... in the treatment of patients” by physicians, these pharmaceutical products do not constitute “tangible personal property.” Tenn. Code Ann. § 67-4-702(23). Because sales subject to business tax are sales of tangible personal property, the pharmaceutical products Eisai sold to its Specialty Distributors are expressly exempted from business tax, regardless of whether the sales are classified as wholesale sales or retail sales. *See* Tenn. Code Ann. § 67-4-702(16), (18)(A)(i), (23) & (26)(A). To paraphrase the Department, no one can be a seller of something that, for business tax purposes, cannot be sold. *See* Department’s Response, p. 9.

Accordingly, the Court determines that Eisai’s sales to the Specialty Distributors of its pharmaceutical products that are “inserted or affixed to the human body” or “dispensed . . . in the treatment of patients” by physicians are exempt from business tax. Tenn. Code Ann. § 67-4-702(23). As such, the Court determines that the Department’s Assessment of business tax on Eisai’s sales to the Specialty Distributors during the tax period is improper and must be fully abated.

(Footnotes omitted).

As the trial court correctly noted, it is undisputed that the pharmaceuticals Eisai sold to its Specialty Distributors are administered directly to the patient by the medical providers. Further, it is undisputed that the sale of Eisai’s pharmaceuticals by the Specialty Distributors are restricted to medical providers that administer Eisai’s infused drugs and that the medical providers who buy these pharmaceuticals from the Specialty Distributors insert or affix them to the human body or dispense them in the course of treating their patients. Thus, as the trial court correctly held, Eisai’s sales to the Specialty Distributors of its pharmaceutical products are “inserted or affixed to the human body” or “dispensed . . . in the treatment of patients” by the medical providers who purchased the pharmaceuticals from the Specialty Distributors and, thus, are exempt from business tax under Tennessee Code Annotated § 67-4-702(a)(23). As the trial court stated in its final order, “no one can be a seller of something that, for business tax purposes, cannot be sold.”

For the foregoing reasons, we affirm the trial court's ruling that the Department's assessment of business tax on Eisai's sales to the Specialty Distributors during the tax period is improper and must be fully abated.³

IN CONCLUSION

The judgment of the trial court is affirmed as modified, and this matter is remanded with costs of appeal assessed against the Department of Revenue.

FRANK G. CLEMENT JR., P.J., M.S.

³ Additional issues were raised by the parties; however, these issues are pretermitted as moot based upon our ruling above. *See Jacks v. City of Millington Bd. of Zoning Appeals*, 298 S.W.3d 163, 175 (Tenn. Ct. App. 2009) (“[A] case will generally be considered moot when the prevailing party will be provided no meaningful relief from a judgment in its favor.”) (citations omitted).