

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(55)S
Sales Tax
November 1, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100514A

On May 14, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its sales of [REDACTED] (“Product”) qualify for exemption from sales tax as drugs and medicines under Tax Law §1115(a)(3).

We conclude that Product is medical equipment for purposes of Tax Law §1115(a)(3). Accordingly, the sale of Product to patients is exempt from sales tax, but its sale to medical providers is not.

Facts

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner supplies drugs, medicines, medical equipment, and supplies to medical services providers and patients. Among the items that Petitioner sells is Product. Because a physician’s order is required for the purchase of the product, sales to both medical services providers and patients are shipped to physicians or medical facilities.

Petitioner represents that Product is a plastic T-shaped device that is wrapped in copper wire. Product’s packaging has a federal warning label that restricts it to sale by or on the order of a physician. Product is inserted by a physician into the uterus of the patient. Product may remain implanted in the woman’s uterus for up to 12 years. The function of the “copper-bearing” contraceptive device is to kill the sperm. It releases copper ions, and copper is toxic to sperm. The copper-bearing contraceptive device interferes with fertilization and makes the uterus a “spermicidal environment.” The copper adds to the effectiveness of the contraceptive device in other ways. It affects the lining of the uterus by not allowing an egg to implant. It also stimulates the production of prostaglandins, which are chemicals that affect the hormones needed to support a pregnancy.

The U.S. Food and Drug Administration (FDA) classifies Product as a drug with an active ingredient of copper. The FDA listing indicates that the “Dosage Form/Route” for Product is an intrauterine device. Product is listed in the Physician’s Desk Reference, and copper is listed in the U.S. Pharmacopeia.

Analysis

Drugs and medicines intended for use in the cure, mitigation, treatment, or prevention of illnesses or diseases in human beings are exempt from sales and use tax. Medical equipment and supplies required for such use or to correct or alleviate physical incapacity are exempt if purchased by patients, but are taxable if purchased at retail for use in performing medical and similar services for compensation. Tax Law §1115(a)(3).

The Tax Department previously concluded in an advisory opinion that Product is medical equipment. Accordingly, sales of Product to patients are exempt from sales tax, and sales to medical services providers are taxable. *See* Adv Op Comm T&F, March 9, 2009, TSB-A-09(13)S. It had been represented in that case

that the FDA classified Product as a device. The facts submitted by Petitioner in the present matter indicate that the FDA classifies Product as a drug. Petitioner has not presented any evidence, however, that Product is recognized as a drug or medicine in the U.S. Pharmacopeia.

The FDA classification of Product does not affect the sales tax treatment of Product under Tax Law §1115(a)(3). Statutory exemptions are construed narrowly against the taxpayer. *See Allied New York Services, Inc. v Tully* (3d Dept 1981) 83 AD2d 727, 728. Sales tax regulation section 528.4(b)(1) defines “drugs and medicines” as (i) articles, whether or not a prescription is required for purchase, which are recognized as drugs or medicines in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary, and intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans; and (ii) articles (other than food) intended to affect the structure or any function of the human body. The definition of “drugs and medicines” in the Sales and Use Tax Regulations does not make the FDA’s treatment of an article a determinant of whether the article qualifies as a drug or medicine. Further, those regulations specifically treat intrauterine devices as medical equipment for purposes of section 1115(a)(3). *See* 20 NYCRR §528.4(e), Example 4. The Tax Department’s publications have followed that rule. *See* Publication 822, *Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items* (6/01); Publication 840, *Guide To Sales Tax For Drugstores and Pharmacies* (8/98), pp. 11, 29.

The Tax Department concluded in TSB-A-10(9)S, Adv Op Comm T&F, March 8, 2010, that Mirena, a levonorgestrel-releasing intrauterine system, is an exempt drug for purposes of Tax Law §1115(a)(3). Unlike Product however, Mirena is recognized as a drug in the U.S. Pharmacopeia.

Based on the Tax Department’s published treatment of IUDs in our regulations and publications and the fact that Product has not been recognized as a drug or medicine in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary, we conclude that Product is medical equipment. Accordingly, sales of Product are exempt upon sale to patients, but taxable when sold to medical services providers.

DATED: November 1, 2010

/s/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.