

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

TSB-A-11(31)S  
Sales Tax  
November 17, 2011

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S111012A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether sales of products containing a sun protection factor (SPF) of 2 or greater, including facial moisturizers, cosmetic make-up in liquid and powder form, and other cosmetic liquid or powder products are exempt from sales and use tax. Petitioner further asks if the presence of a fragrance or color in a product is a determining factor in its taxability.

We conclude that, pursuant to Tax Law §1115(a)(3) and 20 N.Y.C.R.R. §528.4, petitioner's products are cosmetics, notwithstanding the presence of medicinal ingredients, and receipts from the sales of these products are subject to State and local sales and use taxes. Although not a determining factor, the presence of a fragrance or color in a product supports the conclusion of taxability.

**Facts**

Petitioner is a retailer that markets and sells, among other products, facial moisturizers, cosmetic make-up in liquid and powder form, and other cosmetic liquid or powder products that contain a SPF of 2 or greater.

Petitioner notes that TB-ST-135 (April 13, 2011) includes sunscreens with a SPF of 2 or greater among those products exempt from state and local sales and use taxes. TB-ST-135 is in accord with prior Departmental publications. *See* Publication 840, *A Guide to Sales Tax for Drugstores and Pharmacies* (8/98), p.6 & p.25.

**Analysis**

All retail sales of tangible personal property are subject to sales tax pursuant to Tax Law §1105(a), unless otherwise exempted. Tax Law §1115(a)(3) provides an exemption for “[d]rugs and medications intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses in human beings ... and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein...”

The Sales and Use Tax Regulations define “drugs and medicines” as “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 provides that “(2) [t]he base or vehicle used (oil, ointment, talc, etc.) and the medium used for delivery (disposable wipe, syringe, saturated pad, etc.) of a drug or medicine will not affect its exempt status.” 20 N.Y.C.R.R. § 528.4(b)(1)

The regulations define “cosmetics” as “[a]rticles intended to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles are subject to tax. Example: Cold creams, suntan lotions and makeup are taxable cosmetics.”

The petition does not dispute that the products in question are cosmetics as defined by 20 N.Y.C.R.R. §528.4(c). Further, the product examples provided by the Petitioner consisted of moisturizers and powders that are identified in product labeling and marketing as cosmetics, with sun protection as an added benefit. Although not dispositive, the finding that the products are cosmetics is further supported by the presence of fragrance and coloring. “Generally, products that contain coloring, perfume, or similar additives are considered to be cosmetic or toiletry products, and the sale of such products is subject to sales tax.” *PUB-840, supra at 6*. The SPF ingredients contained in Petitioner’s products are drugs or medicines intended to mitigate or prevent illness.

The question for resolution, then, is whether the presence of the SPF ingredients in these cosmetics transforms them into drugs and medicines eligible for the §1115(a)(3) sales tax exemption. It does not. Tax Law §1115(a)(3) and 20 N.Y.C.R.R. §528.4(a)(3) directly address this issue providing that cosmetics are taxable “notwithstanding the presence of medicinal ingredients therein.” *See Adv Op Comm T&F, November 16, 2010, TSB-A-10(58)S; Skin Culture Institute, Inc., Adv Op Comm T&F, August 4, 1999, TSB-A-99(38)S. Cf. Mannatech Incorporated, Adv Op Comm T&F, July 25, 2002, TSB-A-02(36)S* (lotions were deemed taxable cosmetics, but antiseptic gel the sole purpose of which was the treatment of “minor burns, scratches, cuts, insect bites, and other minor skin conditions to help prevent against infection,” was found to be exempt from sales tax).

DATED: November 17, 2011

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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.