

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-97(15)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961212B

On December 12, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Dr. Marvin Fader, 23-35 Bell Blvd., Bayside, New York 11361.

The issue raised by Petitioner, Dr. Marvin Fader, is whether receipts from the sales of "Rogaine" are subject to sales tax.

"Rogaine," containing 2 percent Minoxidil, is a topical solution developed and manufactured by Pharmacia & Upjohn, Inc. (formerly, The Upjohn Company) of Kalamazoo, Michigan that is used as a hair regrowth treatment for men and women. In 1988, the Food and Drug Administration (FDA) approved this product for sales in the United States as a prescription drug to individuals with hereditary hair loss or male pattern baldness (*androgenetic alopecia*). The active ingredient Minoxidil that is contained in "Rogaine" was originally approved by the FDA in the 1970's as a treatment for high blood pressure (see, The United States Pharmacopeia/The National Formulary, 1995, at page 1032).

In February 1996, the FDA approved the over-the-counter sales of "Rogaine," making it available for the first time without a physician's prescription. Petitioner has indicated and Pharmacia & Upjohn, Inc. has confirmed that this product's formula has not changed since its approval by the FDA in 1988. The FDA, having determined that "Rogaine" could be used safely without a doctor's direct supervision, made this switch from prescription to over-the-counter sales as part of its efforts to keep up with consumers' wishes to be more involved in their own health care (see, FDA Consumer, November 1996, at page 6).

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes tax on, "receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1115(a) of the Tax Law provides in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

Section 528.4 of the Sales and Use Tax Regulations provides in part:

(a) Exemption. (1) Drugs and medicines intended for the use, internally or externally in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health are exempt.

* * *

(b) Drugs and medicines. (1) Drugs and medicines mean:

(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;

(ii) articles (other than food) intended to affect the structure or any function of the human body.

* * *

(3) Products consumed by humans for the preservation of health include other substances used internally or externally, which are not ordinarily considered drugs or medicines.

Opinion

Receipts from the retail sales of "Rogaine" are exempt from sales tax under Section 1115(a)(3) of the Tax Law. The February 1996 approval by the FDA for the over-the-counter sales of "Rogaine" had no bearing on this exemption from tax.

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Unlike many other states, New York's sales tax exemption on drugs, medicines and other products consumed for the preservation of health does not depend on whether a physician's prescription is required in order to purchase such a product.

DATED: March 26, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.