

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-01(5)S  
Sales Tax  
January 11, 2001

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000523A

On May 23, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Barrett Gravante Carpinello & Stern LLP, 100 State Street, Suite 900, Albany, New York 12207. Petitioner, Barrett Gravante Carpinello & Stern LLP., submitted additional information with respect to the Petition on July 7, 2000 and November 21, 2000.

The issues raised by Petitioner are:

1) Whether ventilators and the necessary component parts described below used to treat patients with certain permanent lung and/or respiratory conditions who must receive oxygen through a ventilator to sustain life are exempt from sales and compensating use taxes.

2) Whether such component parts as well as the 50 PSI compressor used with respect to patients with permanently impaired respiratory function who have had permanent tracheotomies, but are not on ventilators, are exempt from sales and compensating use taxes.

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

Petitioner's client ("Corporation") sells and distributes supplies, equipment, prosthetic aids, and component parts, including ventilators and related component parts within New York State. The related component parts include ventilator circuits, ventilator filters, oxygen concentrators (which convert room air to oxygen), and suction units (canisters, tubing and related apparatus).

People afflicted with certain permanent lung and/or respiratory conditions must receive oxygen through a ventilator to sustain life. Ventilators provide such afflicted patients with the necessary levels of oxygen, which could not otherwise be obtained as a result of their malfunctioning or inoperative lungs. As such, ventilators function to provide the patient with the power to receive the necessary amount of oxygen to survive.

The related component parts described above are also used for patients with permanently impaired respiratory function who have had tracheotomies, but are not on ventilators. A tracheotomy is a surgical procedure in which an incision is made in the front of the neck and a breathing tube is placed into the trachea, which is also called the windpipe. The tube that is placed into the trachea is called a tracheotomy tube. A tracheotomy may be done on a permanent basis or on a temporary basis, such as when there is an emergency and the normal airway is blocked by swelling or blood. Patients that have a tracheotomy require such related component parts as well as a 50 PSI

compressor that maintains moisture in the airway opening. These non-ventilator patients similarly cannot breathe without mechanical support.

**Applicable Law and Regulations**

Section 1105(a) of the Tax Law imposes a tax on “(t) he 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:

(a) 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... 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.

(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings.

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

\* \* \*

(g) Supplies. (1) Supplies used in the cure, mitigation, treatment or prevention of illnesses or diseases or for the correction and alleviation of physical incapacity are exempt.

\* \* \*

(2) Medical supplies are not exempt if purchased by a person performing medical or similar services for compensation....

(h) Taxable medical equipment and supplies. (1) Medical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax.

Section 528.5 of the Sales and Use Tax Regulations provides, in part:

(a) Exemption. Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof, purchased to correct or alleviate physical incapacity in human beings are exempt from the tax.

(b) Qualifications. (1) In order to qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device, the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity.

(c) Replacement parts. (1) Replacement parts for prosthetic aids, hearing aids, eyeglasses and artificial devices must be identifiable as such at the time the retail sale is made. If the replacement parts are not identifiable parts for prosthetic aids, the purchaser must pay the tax at the time of purchase. The purchaser may apply . . . for a refund of the tax paid provided he can show that the replacement parts were used on exempt prosthetic aids.

\* \* \*

(2) Supplies used in conjunction with prosthetic aids, hearing aids, eyeglasses and artificial devices are not exempt from the tax.

## **Opinion**

### **Issue 1**

The function of the ventilator is key in determining whether it should be classified as medical equipment or as a prosthetic aid (see Comprehensive Dialysis Center of WNY, Inc., Adv Op Comm T&F, August 4, 1998, TSB-A-98(51)S; Cobe Laboratories, Inc., Adv Op Comm T&F, August 6, 1998, TSB-A-98(53)S). In patients with permanently inoperative or permanently malfunctioning lungs or respiratory systems, the ventilator and component parts thereof replace the function of the lung or respiratory system. Therefore, and to the extent that the ventilator and component parts

thereof such as the ventilator circuits, filters, oxygen concentrators and suction units completely or partially replace **permanently** inoperative or **permanently** malfunctioning lungs or respiratory systems, the ventilator and such component parts qualify as prosthetic aids and parts under Section 1115(a)(4) of the Tax Law and Section 528.5 of the Sales and Use Tax Regulations. Therefore, in such cases, the exemption under Section 1115(a)(4) of the Tax Law would apply. However, supplies used in conjunction with such prosthetic aids are not exempt under Section 1115(a)(4) but may be exempt under Section 1115(a)(3) if purchased by the patient.

Ventilators that are not used to completely or partially replace permanently inoperative or permanently malfunctioning lungs or respiratory systems, as in the case where a ventilator is used for patients under anesthesia when undergoing surgery, would not qualify as a prosthetic aid. However, ventilators, component parts and related supplies which are not exempt under Section 1115(a)(4) of the Tax Law but are used in the cure, mitigation, treatment or prevention of illness or disease in human beings or to correct or alleviate physical incapacity, for example used in surgery as noted above, are exempt from sales and use taxes under Section 1115(a)(3) of the Tax Law, except when purchased at retail by a non-exempt purchaser for use in performing medical and similar services for compensation. See Microvasive, Inc., Adv Op Comm T&F, March 28, 1989, TSB-A-89(9)S.

## **Issue 2**

Where a tracheotomy is done on a permanent basis, the component parts described above and the 50 PSI compressor used to facilitate the tracheotomy are considered to be performing the function of a permanently inoperative or permanently malfunctioning body part. Therefore, in such a situation, the compressor and component parts would constitute prosthetic aids and parts within the meaning and intent of Section 1115(a)(4) of the Tax Law and Section 528.5 of the Sales and Use Tax Regulations, and sales of such compressor and component parts for such purpose would be exempt. However, supplies used in conjunction with such prosthetic aids are not exempt under Section 1115(a)(4) but may be exempt under Section 1115(a)(3) if purchased by the patient.

Where a tracheotomy is done on a temporary basis, the component parts and the compressor used in connection with such tracheotomies do not completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part. Accordingly, they do not qualify for exemption under Section 1115(a)(4) of the Tax Law and Section 528.5 of the Sales and Use Tax Regulations. The compressor, component parts, and related supplies in this instance would constitute medical equipment and supplies intended for use in the correction or alleviation of physical incapacity. (See Section 1115(a)(3) of the Tax Law and Section 528.4(e) of the Sales and Use Tax Regulations). Therefore, such compressors, component parts and related supplies used for such temporary purpose would be exempt from sales and use taxes under Section

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1115(a)(3) of the Tax Law, except when purchased at retail by a non-exempt purchaser for use in performing medical and similar services for compensation.

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/s/  
Jonathan Pessen  
Tax Regulations Specialist III  
Technical Services Division

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