

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

TSB-A-07(7)S
Sales Tax
March 16, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060510A

On May 10, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tax Matrix Technologies, LLC, 1011 Mumma Road, Suite 101, Wormleysburg, Pennsylvania 17043.

The issue raised by Petitioner, Tax Matrix Technologies, LLC, is whether Paraben-Free Pro-Gest cream and Original Pro-Gest cream are exempt from sales and use tax under section 1115(a)(3) of the Tax Law.

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

Paraben-Free Pro-Gest cream and Original Pro-Gest cream are applied topically to the skin and contain progesterone as an ingredient. The manufacturer's Web site states that "supplementing the circulating levels of progesterone would curb a whole range of distressing experiences women had simply come to accept as part of being a woman."

The Web site's disclaimer states "This information is intended for educational purposes only. These statements have not been evaluated by the Food and Drug Administration. These products are not intended to diagnose, treat, cure or prevent disease."

Other products sold by the manufacturer include natural wellness products designed for women over 40 as well as sexual vitality and skin care products.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The 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 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 . . . and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein

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.

* * *

(3) Cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein are taxable. Medical equipment (including component parts thereof) and supplies, other than drugs and medicines, purchased at retail for use in performing medical and similar services for compensation are not included in the exemption.

* * *

(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.

(2) The 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.

(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.

* * *

(c) Cosmetics. Articles 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.

Opinion

Paraben-Free Pro-Gest cream and Original Pro-Gest cream both contain progesterone. Neither Petitioner nor the manufacturer's Web site makes any representation that these products are drugs or medicines intended for use, internally or externally, in the cure, mitigation, treatment, or prevention of illnesses or diseases in human beings or are consumed by humans for the preservation of health. Indeed, the manufacturer's Web site carries a disclaimer stating "These products are not intended to diagnose, treat, cure or prevent disease."

Accordingly, based on the facts presented in the Petition, notwithstanding the presence of medicinal ingredients, these products are not considered drugs or medicines or products consumed for the preservation of health as contemplated by section 1115(a)(3) of the Tax Law. Therefore, receipts from the sale of these products are subject to sales or use tax under section 1105(a) of the Tax Law.

DATED: March 16, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.