

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

TSB-A-12(15)S
Sales Tax
July 5, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S11102A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether certain products (electrical muscle stimulator unit, EMS placement belt, cervical pillow, orthopedic lumbar cushion, massage device, egg crate orthopedic mattress, whirlpool bath and infrared heating lamp) it sells directly to a customer who present a doctor's written prescription qualify for the exemption under the sales and use tax for medical equipment or supplies. We conclude that Petitioner's products do not qualify for the exemption.

Facts

Petitioner claims that "the items are sold directly to the patient, by prescription of a licensed doctor, and billed to the insurance company, any item it sells would be considered primarily used for medical purposes and, therefore, exempt." Petitioner also submitted with its request copies of letters of medical necessity for the items in question for patients to whom it has sold these items.

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) exempts medical equipment and supplies from sales and compensating use tax, unless purchased at retail for use in performing medical and similar services for compensation. An exemption is strictly construed and the burden of proving non-taxability is on the person claiming the exemption. *See* 20 NYCRR §528.1(c).

Medical equipment is defined as machinery, apparatus, and other devices (other than prosthetic aids, hearing aids, eye glasses and artificial devices which qualify for exemption under section 1115(a)(4) of the Tax Law), which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings. To qualify for this exemption, the equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity. *See* 20 NYCRR §528.4(e).

Petitioner's products in question: electrical muscle stimulator unit, EMS placement belt, cervical pillow, orthopedic lumbar cushion, massage device, egg crate orthopedic mattress, whirlpool bath and infrared heating lamp, are all generally useful in the absence of illness, injury

or physical incapacity. The Department has already specifically opined in Publication 832, that massage devices, orthopedic mattresses and whirlpool baths are taxable to all.

Electrical muscle stimulator units and EMS placement belts are useful for other than illness, injury or physical incapacity. For instance, EMS has become useful as a strength training tool for healthy persons.

Cervical pillows and orthopedic lumbar cushions are both used for prevention of injury, comfort, or both, and as such, they are useful for other than treatment of illness, injury or physical incapacity.

Infrared heating lamps are now available in saunas, clubs and hot yoga studios. In addition to the claimed physical and physiological benefits of infrared heat to improve physical health, infrared heat lamps are commonly used in food preparation areas to keep food warm, as such they are useful for other than treatment of illness, injury or physical incapacity.

Because Petitioner's products may be generally useful in the absence of illness, injury or physical incapacity, they do not qualify for the exemption for medical equipment and supplies.

DATED: July 5, 2012

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.