

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-15(49)S
Sales Tax
December 11, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S150127A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its Moist Heat Pack constitutes medical equipment exempt from sales tax. We conclude that Petitioner’s Moist Heat Pack is medical equipment exempt from sales tax.

Facts

Petitioner’s Moist Heat Pack (the “Product”) is designed to provide relief from breastfeeding pain and discomfort. It is used to treat various breastfeeding conditions such as mastitis, clogged milk ducts and milk blisters, and also can help prevent mastitis. The Product also can replace hot or cold packs that are used for other ailments.

The Product is a therapy pack composed of a cotton flannel pillow filled with flaxseed that can be heated or cooled. The pillow is inserted into a food safe, water-resistant pouch. The pouch can then be put in a bra against the skin. A cloth also can be attached to the pouch to wear against the skin. This cloth can be moistened under warm or cold water.

Petitioner currently sells the Product to retailers and on the Internet directly to consumers. Petitioner may begin selling the Product to hospitals soon.

Analysis

Sales tax is imposed on the sale, except for resale, of tangible personal property. *See* Tax Law § 1105(a). Medical equipment, other than medical equipment purchased at retail for use in performing medical and similar services for compensation, is exempt from sales and use tax pursuant to Tax Law § 1115(a)(3). “*Medical equipment* means machinery, apparatus and other devices . . . 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.” 20 NYCRR § 528.4(e)(1). Equipment will qualify as medical equipment only if it is “primarily and customarily used for medical purposes and [is] not [] generally useful in the absence of illness, injury or physical incapacity.” 20 NYCRR § 528.4(e)(2).

Heating pads and medical ice bags, which are similar to Petitioner’s Product, have previously have been determined to qualify as medical equipment. *See* Publication 822, *Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items*. Additionally, the Product generally is not useful in the absence of illness, injury or physical incapacity. Accordingly, the Product constitutes medical equipment exempt from sales tax pursuant to Tax Law § 1115(a)(3).

Notably, if the Product is purchased at retail for use in performing medical and similar services for compensation, the sale of the Product is excluded from the exemption provided by Tax Law § 1115(a)(3), and is subject to sales tax. However, sales of equipment to an organization that is exempt pursuant to Tax Law § 1116(a) are not subject to tax. *See* TSB-A-14(16)S. Thus, if Petitioner eventually does sell the Product to hospitals for use in performing medical services for compensation, Petitioner will need to determine whether the hospital is an exempt organization pursuant to Tax Law § 1116(a). Petitioner's records for each sale to an exempt organization should include a copy of Petitioner's invoice listing the exempt organization as the purchaser and a copy of Form ST-119.1, *Exempt Organization Exempt Purchase Certificate*, completed by the organization. *See id.*

DATED: December 11, 2015

/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.