

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether receipts from the sale of its Multi-Mode Stimulator (“Device”) are subject to sales tax. We conclude that Petitioner’s Device is medical equipment exempt from sales tax, because it is not sold for use in performing medical services for compensation.

Facts

Petitioner sells durable medical equipment from its headquarters and sole business location outside New York State. Among the products it sells to New York customers is the Device, a portable electrotherapy device used to treat and alleviate chronic and acute pain, as well as to treat certain types of muscular injuries. The Device is prescribed specifically to treat various types of pain, to relax muscle spasms, increase blood flow circulation, or prevent disuse atrophy. The Device also may be prescribed for muscle re-education, maintaining or increasing range of motion, or for immediate post-surgical stimulation of lower leg muscles to prevent venous thrombosis. The US Food and Drug Administration (FDA) classifies the Device as a Class II medical device, for which a prescription is required.

The Device features four therapeutic modes. Each mode sends varying degrees of electronic pulses and impulses, which stimulate the nerves or muscles in the treatment area. The stimulation is designed to be applied to the patient’s neck, shoulder, hand, lower back, knee or foot. The transcutaneous electrical nerve stimulator (TENS) mode is used for non-narcotic pain management and is not useful in the absence of pain. The muscle stimulator modes are used to relieve muscle spasms or slow the progression of disuse atrophy. Petitioner states that none of the modes have sufficient voltage to build muscle, and that the science does not support the theory that electric muscle stimulators are effective in non-medical exercise.

Petitioner does not sell the Device to medical practitioners. Each medical practitioner who prescribes the Device for patients stores an inventory of the Devices, provided by the Petitioner, in their offices. The medical practitioners do not purchase the Devices and any unsold inventory of the Devices are returned to Petitioner if either the practitioner or Petitioner no longer desire to continue this arrangement. No money is exchanged between the Petitioner and the medical practitioners. When a medical practitioner prescribes the Device, they provide the patient’s insurance information to the Petitioner, which requests approval from the patient’s health insurance company. If the insurer approves payment, Petitioner authorizes the medical practitioner to dispense the

Device directly to the patient. If the insurer declines payment, the patient does not receive the Device. The Petitioner receives payment for the product directly from the patient's insurance provider.

The medical practitioners do not provide any services using the Device; they only instruct the patient in the use of the Device. Patients use the Devices at the location of their choice in accordance with the instruction manual and based on their medical practitioner's specific instruction for each patient's condition.

Analysis

All retail sales of tangible personal property are subject to sales tax pursuant to Tax Law § 1105(a), unless otherwise exempt. 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) that 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)(2).

Although the Department has previously opined in TSB-A-12(15)S that “[e]lectrical muscle stimulator units and EMS placement belts are useful for other than illness, injury or physical incapacity,” this Device is available only with a prescription for use in treating certain medical conditions and cannot be used to build muscle. Based on these facts, we conclude that the Device is used for the treatment of disease or physical incapacity in human beings, and is not useful in the absence of illness, injury or physical incapacity. In addition, because Petitioner is paid for the Device by the patients' insurance provider, the Device is sold to the patients, and not to medical practitioners for use in providing medical services for compensation. Accordingly, the Device is exempt from sales tax.

DATED: August 1, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.