

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-98(24)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S971002A

On October 2, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Medical Technology, Inc., 2601 Pinewood, Grand Prairie, TX 75051.

The issue raised by Petitioner, Medical Technology, Inc., is whether the sale of orthopaedic devices, commonly referred to as braces, to physicians, hospitals, clinics and other health care providers are subject to New York State and local sales and use taxes.

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

Petitioner is engaged in the business of manufacturing and selling orthopaedic braces. Petitioner's primary customers are physicians, hospitals, clinics and other health care providers. Petitioner manufactures these orthopaedic braces and sells them to these physicians, medical facilities and providers for use by their patients.

Applicable Laws and Regulations

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property"

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five.

Section 1115(a) of the Tax Law provides, in part, as follows:

Sec. 1115. Exemptions from sales and use taxes.--(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 cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or 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.

Section 1116 of the Tax Law provides, in part:

Sec. 1116. Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

* * *

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

* * *

(7) A not-for-profit corporation operating as a health maintenance organization subject to the provisions of article forty-four of the public health law.

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

(e) Medical equipment. (1) Medical equipment means 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.

* * *

Example 1: Items such as hospital beds, wheel chairs, hemodialysis equipment, iron lungs, respirators, oxygen tents, crutches, back and neck braces, trusses, trapeze bars, walkers, inhalators, nebulizers and traction equipment are exempt medical equipment.

* * *

(4) Medical equipment is 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.

* * *

(2) Medical services for human beings include but are not limited to the practices of medicine, dentistry, therapy, chiropractic, nursing, podiatry, optometry and radiology, whether performed by a private practitioner, clinical laboratory, hospital, nursing home, ambulance service, clinic, or health maintenance facilities.

Opinion

Publication 822, Taxable Status of Medical Equipment and Supplies, Prosthetic Devices and Related Items, (7/87), provides that braces which are used for ankles, arms, elbows, knees, ankles, legs and spines are exempt unless purchased for use in performing medical or similar services for compensation.

Bruce Mac Corkindale, CPA, Adv Op Comm T&F, June 21, 1993, TSB-A-93(37)S held that purchases made by an orthotist of custom made braces and parts used to manufacture braces were not subject to sales tax since the activities of an orthotist do not constitute a medical service.

Petitioner is engaged in the business of manufacturing and selling orthopaedic braces. Petitioner's primary customers are physicians, hospitals, clinics and other health care providers who buy the product for the use of their patients.

Publication 822 indicates that the sales of orthopaedic braces are exempt from sales and use tax unless purchased for use in performing medical or similar services for compensation. Physicians, hospitals, clinics and other health care providers generally perform medical or similar services for compensation. Therefore, pursuant to Section 1115(a)(3) of the Tax Law and Section 528.4 of the Sales and Use Tax Regulations, Petitioner's sales of orthopaedic braces to physicians, hospitals, clinics and other health care providers are subject to sales and use tax since the sales are being made to persons performing medical and similar services for compensation. Petitioner's sales to health care providers are retail sales, since the health care providers use the braces to perform medical or similar services that are not one of the enumerated services taxable under Section 1105(c) of the Tax Law.

It is noted, however, that purchases made by organizations described in Section 1116(a) of the Tax Law are not subject to sales and use tax. Therefore, Petitioner's sales of its braces to hospitals, clinics, health maintenance organizations and other entities that have been designated as exempt organizations under Section 1116(a) of the Tax Law, or to New York State or United States government entities, will not be subject to sales tax provided Petitioner receives a properly completed Exempt Organization Certification (Form ST-119.1), or, in the case of government entities, a government purchase order, from the purchaser within 90 days of the date of delivery. See Section 1132(c) of the Tax Law and Part 529 of the Sales and Use Tax Regulations.

DATED: April 14, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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