

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

TSB-A-99(38)S
Sales Tax
August 4, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990205A

On February 5, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Skin Culture Institute Inc., 38 West 32nd Street, Suite 1312, New York, New York 10001. Petitioner, Skin Culture Institute Inc., furnished additional information by telephone on March 4, 1999 and on June 17, 1999.

The issue raised by Petitioner is whether the chemical skin peeling treatment sold by Petitioner is exempt from sales and use taxes under Section 1115(a)(3) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion. Much of the information below is contained in Petitioner's brochures for its products.

Petitioner's brochure represents that the skin peeling treatment may be used to treat such complexion problems as acne scarring, large pores, sun damaged skin, fine lines and razor bumps. The skin peeling treatment is sold by Petitioner in the form of a kit containing certain facial creams. During the treatment, on consecutive days, the customer applies one of the creams to his or her face each day, in the order specified by Petitioner. The skin peeling treatment when applied to the face is said to remove dead skin, leaving new, clear smooth skin. The chemical skin peeling treatment exfoliates the dead cell layers. Petitioner's brochure states that the skin peeling treatments "help to improve the skin's appearance, normalize extreme skin conditions and help the skin feel tighter and firmer." The brochure contains other statements that the treatment will improve the user's appearance.

There are different strengths of the skin peeling treatment. For severe problems, stronger treatments are recommended. Depending on the strength used, the treatment must be left on the face up to 90 minutes.

The ingredients of the skin peeling treatment contain a balance of salicylic acid, sulfur, phenol and resorcinol. The formula was originated and developed by a New York doctor and pharmacist. A prescription is not required to purchase the skin peeling treatment. Moreover, there are no restrictions on who may purchase the treatment. Petitioner sells its skin peeling treatment by mail order. The majority of sales are to skin care salons. The treatment is also sold to doctors and to consumers for self application. The skin peeling treatment is marketed by Petitioner as a cosmetic. The label for the box containing Petitioner's peeling creams refers to the product as "The 6 Day Cosmetic Facial Treatment Kit."

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Petitioner states that the Food and Drug Administration (the "FDA") has determined that Petitioner's skin peeling treatment products are drugs, and has monitored the packaging of such products. However, since the skin peeling treatment predates the predecessor of the FDA, the treatment is not under the same testing requirements as products introduced today. Petitioner also states that the New York State Board of Pharmacy has deemed Petitioner to be a wholesaler of drugs and/or devices required to be registered under the State Education Law.

Applicable Laws and Regulations

Section 1105(a) of the Tax Law imposes a tax on "[t]he 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 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

Section 528.4(c) of the Sales and Use Tax Regulations provides as follows:

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.

Section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (the "Act") provides, in part:

The term "drug" means

(A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National formulary, or any supplement to any of them; and

(B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and

(C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and

(D) articles intended for use as a component of any article specified in clause (A), (B), or (C). . . .

Section 509 of the Act provides:

Nonapplicability of 21 USCS §§ 351 et seq. to cosmetics

This chapter, as amended by the Drug Amendments of 1962, shall not apply to any cosmetic unless such cosmetic is also a drug or device or component thereof. (Emphasis added)

Section 6802(7) of Article 137 of the Education Law, which Article establishes the New York State Board of Pharmacy, defines "drugs" in substantially the same way as Section 201 of the Act.

Opinion

In this case, while the skin peeling treatment may contain medicinal ingredients, i.e., salicylic acid, sulfur, phenol and resorcinol, it is not a drug or medicine intended for the use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings. The fact that the FDA and New York State Board of Pharmacy may have determined that Petitioner's product is a drug does not mean that the product may not also be considered a cosmetic for purposes of Section 1115(a)(3) of the Tax Law. The definition of "drug" in both Section 201 of the Federal Food, Drug, and Cosmetic Act (the "Act") and Section 6802 of the Education Law includes products that are not intended for use in the cure, mitigation, treatment or prevention of disease. Unlike the sales tax exemption, these definitions do not exclude cosmetics. Under Section 509 of the Act, requirements respecting drugs may apply to certain cosmetic products. Petitioner's skin peeling treatment is marketed as a cosmetic that improves appearance by treating such complexion problems as acne scarring, large pores, sun damaged skin, fine lines and razor bumps. The majority of Petitioner's sales of this product are to beauty salons. Since this product is applied by the user to the face for the purpose of promoting attractiveness, it is a cosmetic for purposes of Section 1115(a)(3). See Section 528.4(c) of the Sales and Use Tax Regulations.

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Under Section 1115(a)(3), cosmetics are subject to sales and use tax notwithstanding the presence of medicinal ingredients in such cosmetics. Accordingly, the sale by Petitioner of the skin peeling treatment is subject to State and local sales and use taxes.

DATED: August 4, 1999

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

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