

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(23)S
Sales Tax
May 31, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000329A

On March 29, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tony Gilbert, 2 Hopkins Plaza, Suite 2100, Baltimore, MD 21201.

The issue raised by Petitioner, Tony Gilbert, is whether gastrostomy tubes, “spike sets” and feeding machines/pumps purchased by a medical facility and used in conjunction with gastrostomy feedings are prosthetic devices that are exempt from sales and compensating use tax under Section 1115(a)(4) of the Tax Law.

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

For patients who are incapable of oral feeding, a gastrostomy feeding allows substances (nutrients) to enter the stomach through a tube which penetrates the abdominal wall. This feeding regimen replaces the overall ingestion function of the human body by delivering life-sustaining nourishment to the stomach in the patient whose diseased esophagus (the tube connecting the mouth to the stomach) no longer functions properly or at all. Most patients that require gastrostomy tube feedings will never again resume the oral ingestion of food.

A feeding machine specifically designed for gastrostomy feedings provides the power to pump the nutrients (food) through the gastrostomy tube into the stomach. A “spike set,” used in conjunction with the gastrostomy tube, contains the following items:

1. Piercing pin - to pierce the feeding container to begin the flow of the food.
2. Flush bag - for the flush solution.
3. Tubing - to carry the feeding supply to the gastrostomy tube.
4. Adapter for the gastrostomy tube - to connect the tubing to the gastrostomy tube.

The spike sets are also specifically designed for and exclusively used for gastrostomy tube feedings.

Applicable Law 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 exempts from the sales tax imposed by Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

* * *

(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 . . . 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.

(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings.

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, eyeglasses 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.

(2) To qualify, such equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity.

* * *

(4) Medical equipment is not exempt if purchased by a person performing medical or similar services for compensation. . . .

* * *

(g) *Supplies.* (1) Supplies used in the cure, mitigation, treatment or prevention of illnesses or diseases or for the correction and alleviation of physical incapacity are exempt.

* * *

(2) Medical supplies are not exempt if purchased by a person performing medical or similar services for compensation. . . .

Section 528.5 of the Sales and Use Tax Regulations provides, in part:

(a) *Exemption.* Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof, purchased to correct or alleviate physical incapacity in human beings are exempt from the tax.

(b) *Qualifications.* (1) In order to qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device, the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity.

Opinion

Section 1115(a)(4) of the Tax Law exempts from sales and compensating use taxes receipts from the sales of prosthetic aids which alleviate physical incapacity in human beings. To qualify as a prosthetic aid, the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part, and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity. See Section 528.5(b)(1) of the Sales and Use Tax Regulations. In this case, it is the function of the gastrostomy tubes, “spike sets” and feeding machines/pumps purchased by the medical facility that is key in determining whether these items should be classified as exempt prosthetic aids or as medical equipment or supplies which, under Section 1115(a)(3) of the Tax Law, are taxable when purchased at retail for use in the performance of medical or similar services for compensation (see Comprehensive Dialysis Center of WNY, Inc., Adv Op Comm T&F, August 4, 1998, TSB-A-98(51)S; Cobe Laboratories, Inc., Adv Op Comm T&F, August 6, 1998, TSB-A-98(53)S; Microvasive, Inc., Adv Op Comm T&F, March 28, 1989, TSB-A-89(9)S).

The treatment for a patient with a failed esophagus, through which food can no longer pass into the stomach, is feeding through the use of a gastrostomy tube. A gastrostomy tube carries the life-sustaining nourishment directly into the stomach through an opening in the patient’s abdominal wall. As such, when substituting its ability to carry the food into the stomach for the lost ability of a permanently malfunctioning body part, the gastrostomy tube qualifies as a prosthetic aid as defined in Section 528.5(b)(1) of the Sales and Use Tax Regulations and its purchase is not subject to sales or use tax, regardless of whether it is purchased for use in performing medical or similar services for compensation (see Microvasive, Inc., *supra*).

TSB-A-00(23)S
Sales Tax
May 31, 2000

The gastrostomy tube alone cannot perform its function without the spike set to carry the feeding supply to it and the pumping action of the feeding machine to propel the food. In Cobe Laboratories, Inc., supra, and Fresenius USA, Inc., Adv Op Comm T&F, February 29, 2000, TSB-A-00(12)S, it was found that the dialysis machine/tubing/connectors and fistula needles, respectively, are all part of the prosthetic hemodialysis regimen which pumps blood to and from a dialyzer (artificial kidney). Collectively, these items and the dialyzer replace the filtration function of a failed human kidney. Similar to these items, the spike set and feeding machine/pump are essential to the gastrostomy feeding process and contribute to the restoration of the lost function of the esophagus as part of the feeding regimen. Moreover, since they are specifically designed for and are exclusively used in gastrostomy feeding treatment, they satisfy the regulatory requirement that they be primarily and customarily used for such purposes and are not generally useful in the absence of illness, injury or physical incapacity. Accordingly, purchases by the medical facility of spike sets and feeding machines/pumps that replace a missing body part or the function of a permanently inoperative or malfunctioning body part (in conjunction with gastrostomy tubes which qualify for exemption as prosthetic aids) are also exempt from sales tax under Section 1115(a)(4) of the Tax Law (see Comprehensive Dialysis Center of WNY, Inc., supra; Cobe Laboratories, Inc., supra; Fresenius USA, Inc., supra). Moreover, spike sets and feeding machines/pumps that are not exempt under Section 1115(a)(4) of the Tax Law but that are used in the cure, mitigation, treatment or prevention of illness or disease in human beings or to correct or alleviate physical incapacity are exempt from sales and use taxes pursuant to Section 1115(a)(3) of the Tax Law, except when purchased at retail for use in performing medical and similar services for compensation. The sale of such items to a hospital or other organization qualifying for exemption under Section 1116(a) of the Tax Law would be exempt from the imposition of sales tax even if such entity was using the devices in performing medical services for compensation, provided a properly completed exemption certificate is furnished to the seller within ninety days of the date of sale. See Section 1132(c) of the Tax Law.

DATED: May 31, 2000

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

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