

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

TSB-A-02(56)S
Sales Tax
November 7, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020319A

On March 19, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Marilyn Navia, 10265 NW 56 Street, Miami, FL 33178. Petitioner, Marilyn Navia, provided additional information pertaining to the Petition on May 21, 2002.

The issue raised by Petitioner is whether the custom-made ear plugs she sells are considered to be medical devices which would qualify for exemption from New York State and local sales or compensating use tax under Section 1115(a)(3) of the Tax Law.

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

Petitioner is in the business of making custom ear plugs which are used to provide hearing protection to individuals engaged in high noise level activities, such as musicians, construction workers, and those who work around loud machinery. Petitioner's customers may or may not have already experienced a hearing loss.

Petitioner is located outside of New York State, but makes trips into New York to fit and construct the ear plugs for her customers. Petitioner does not sell her product by mail-order or the Internet.

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 1105-B(a) of the Tax Law provides:

Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale by manufacturing, processing, generating, assembling, refining, mining or extracting shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a

use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

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 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.

* * *

(6)(A) Tangible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.

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

(a) *Exemption.* (1) Drugs and medicines intended for the 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 are exempt.

* * *

(e) *Medical equipment.* (1) 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.

(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. (Emphasis added)

* * *

Example 2: A medical patient purchases an air conditioner to be used to lower air temperature to alleviate his illness. Since an air conditioner is nonmedical in nature, it is not exempt from the tax.

Section 528.7(e) of the Sales and Use Tax Regulations provides, in part:

Personal protective equipment. (1) Personal protective equipment purchased by a person engaged in farming for such person’s own use or for use by such person’s employees and used or consumed . . . predominantly in production for sale of tangible personal property by farming (“farm production”) will be exempt from the New York State and local sales and compensating use taxes including the taxes imposed in New York City under section 1107 of the Tax Law.

(2) *Personal protective equipment* means tangible personal property designed to protect an individual against the possible hazards of processes, environmental hazards, chemical hazards or mechanical hazards encountered by the user while engaged directly in farm production, which hazards may cause injury to or impairment in the function of any part of the body through absorption, inhalation or physical contact. . . .

(3) Following are examples of personal protective equipment that may qualify for exemption when used or consumed . . . predominantly in farm production. . . .

* * *

(ii) Ear protection. Protective devices for the ears where there is a danger from any source that could cause physical injury to the ear or cause impairment or loss of hearing.

Section 528.13 of the Sales and Use Tax Regulations provides, in part:

(a) *Exemption.* (1) Exemption from statewide tax. An exemption is allowed from the tax imposed under subdivisions (a) and (c) of section 1105 of the Tax Law, and from the compensating use tax imposed under section 1110 of the Tax Law, for receipts from sales of the following:

* * *

(iii) (a) Parts with a useful life of one year or less, tools or supplies for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale by manufacturing, processing, generating, assembling, refining, mining or extracting.

* * *

(e)(3) The term *supply* means an item of tangible personal property . . . used or consumed in production, whose use is incidental to such production, or which is expendable.

New York State Department of Taxation and Finance Publication 852 (12/97), Sales Tax Information For Manufacturers, Processors, Generators, Assemblers, Refiners, Miners and Extractors, and Other Producers of Goods and Merchandise, provides, in part:

Safety apparel and safety supplies (such as uniforms, hair coverings, safety shoes, gloves, and eye shields) that are indispensable to production, and that are furnished by the manufacturer to the manufacturer's employees, are exempt from both the state and local sales and use taxes. An *Exempt Use Certificate*, Form ST-121, may be issued by the manufacturer to the supplier for the tax-exempt purchase of these items. If a manufacturer sells the safety apparel and supplies to its employees, the manufacturer should issue a *Resale Certificate*, Form ST-120, to the supplier for purchases of these items. Both state and local taxes must be collected when the manufacturer sells the safety apparel or supplies to its employees.

Opinion

Petitioner sells custom ear plugs which are used to provide hearing protection to individuals exposed to loud noise. Petitioner contends that the custom ear plugs should be exempt from sales and use tax as qualifying medical devices under Section 1115(a)(3) of the Tax Law.

Section 1115(a)(3) of the Tax Law exempts medical equipment used in the cure, mitigation, treatment or prevention of illnesses or diseases, or to correct or alleviate physical incapacity, in human beings. Protective devices such as Petitioner's custom ear plugs do not qualify as medical devices merely because they prevent injury (hearing loss). See Robert C. Ferber, Adv Op Comm T&F, October 13, 1988, TSB-A-88(51)S. The fact that the ear plugs may be used by an individual who already has a hearing loss does not detract from the fact that they are also suitable for use by healthy individuals. See Craftmatic Comfort Manufacturing Corp. V. New York State Tax Commission 69 NY2nd 141; Russell J. Shapiro, Adv Op Comm T&F, June 21, 1993, TSB-A-93(39)S. Petitioner's custom ear plugs are not primarily or customarily used for medical

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purposes as required by Section 528.4(e)(2) of the Sales and Use Tax Regulations, but rather are used without regard to the medical condition of an individual. Moreover, due to the nonmedical nature of ear plugs, they are included as taxable devices in New York State Department of Taxation and Finance Publication 822 (6/01), Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items, page 6. Accordingly, notwithstanding their obvious usefulness in protecting their users from injury, Petitioner's custom ear plugs do not qualify as medical devices within the meaning of Section 1115(a)(3) of the Tax Law and are subject to sales tax. See Robert C. Ferber, supra.

It is noted that even though Petitioner's custom ear plugs do not qualify as exempt medical devices, they do fall within the exemption provided in Section 1115(a)(6) of the Tax Law if purchased by a customer for use or consumption predominantly in farm production. See Section 528.7(e)(3)(ii) of the Sales and Use Tax Regulations. They also fall within the exemption provided in Section 1105-B of the Tax Law if purchased by a manufacturer for use or consumption directly and predominantly in production. (See Section 528.13(e)(3) of the Sales and Use Tax Regulations. See also Publication 852, supra.) If the manufacturer sells the custom ear plugs to its employees, the manufacturer may purchase them for resale from Petitioner, and must collect both state and local taxes when it sells the custom ear plugs to its employees. To claim these exemptions, Petitioner's customers must present her with a *Farmer's and Commercial Horse Boarding Operator's Exemption Certificate*, Form ST-125, an *Exempt Use Certificate*, Form ST-121, or a *Resale Certificate*, Form ST-120, respectively, within 90 days of the date of the sale.

DATED: November 7, 2002

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