

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

TSB-A-96 (82) S
Sales Tax
December 26, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960611A

On June 11, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Weaver Corporation, 666 Fifth Avenue, 21st Floor, New York, NY 10103. Petitioner, Weaver Corporation, submitted additional information pertaining to the Petition on October 29, 1996.

The issue raised by Petitioner is whether the sale of a specialized "Bed Pillow" when recommended by a physician to control gastroesophageal reflux disease is subject to sales and use taxes.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is considering selling "Bed Pillows" to either medical groups for resale, or to the medical group's patients on a direct sale basis. Petitioner contends that the "Bed Pillow" should eliminate or reduce the need to take medication for the control of gastroesophageal reflux disease. While a medical prescription is not required for this product, it would be acquired upon the recommendation of a health maintenance organization or a physician.

The "Bed Pillow" is a wedge of foam rubber, approximately 42" long, increasing in thickness from 1" at the narrow end to 8" at the thick end. The "Bed Pillow" is available in widths of 27", 30" and 36"

Petitioner contends that to the best of its knowledge, the "Bed Pillow" has no other application, except for the control of this medical problem.

Section 1115(a)(3) of the Tax Law provides an exemption from sales tax for:

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 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. (See subdivision (g) of this section)

Petitioner's "Bed Pillow", for use as described above and presuming that the "Bed Pillow" is not generally useful in the absence of illness, injury or physical incapacity, qualifies for the exemption from sales and compensating use tax provided by Section 1115(a)(3) of the Tax law and Section 528.4 of the Sales and Use Tax Regulations. See Pegasus Airwave, Inc., Adv Op Comm T&F, January 8, 1996, TSB-A-96(1)S.

However, the exemption contained in Section 1115(a)(3) of the Tax Law and Section 528.4 of the Sales Tax Regulations does not apply to the sale of medical equipment and supplies, other than drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

Therefore, Petitioner's sales of its "Bed Pillow" directly to patients are not subject to sales or compensating use tax. When Petitioner sells its "Bed Pillow" to someone who will use it in performing medical and similar services for compensation, such as a doctor or hospital, Petitioner must collect sales or use tax due from the purchaser. However, if the sale is to an organization exempt under section 1116(a) of the Tax Law or to someone who will resell the "Bed Pillow", such as a wholesaler, then no sales or use tax will be due, provided that Petitioner obtains the appropriate exemption document from the purchaser.

DATED: December 26, 1996

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

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