

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-07(23)S  
Sales Tax  
August 27, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070606A

On June 6, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Martin Friedman, PC, 2600 Nostrand Avenue, Brooklyn, NY 11210.

The issue raised by Petitioner, Martin Freidman, PC, is whether purchases of disposable adult diapers by a nursing home are subject to sales tax.

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

Petitioner's clients operate nursing home facilities in New York State. The nursing homes purchase adult diapers from various vendors. The adult diapers are purchased for use by the nursing homes' residents. These nursing homes have experienced differences among various vendors regarding the tax treatment of purchases of the adult diapers.

**Applicable law and regulations**

Section 1105(a) of the Tax Law imposes sales tax on "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Pursuant to Chapter 82 of the Laws of 2007, effective September 1, 2007, section 1107(b)(11) of the Tax Law will provide:

Notwithstanding any provision of law to the contrary, clothing and footwear and any item used or consumed to make or repair such clothing and which becomes a physical component part of such clothing shall be exempt from the taxes imposed by this section.

Section 1109(g) of the Tax Law provides, in part:

In the event that a county, city or school district located in the metropolitan commuter transportation district . . . elects to provide the clothing and footwear exemption authorized in paragraph one of subdivision (a) of section twelve hundred ten of this chapter . . . the exemption provided by paragraph thirty of subdivision (a) of section eleven hundred fifteen of this article shall be applicable in such portion of the metropolitan commuter transportation district in which such county, city or school district . . . is located. . . .

Section 1210(a)(1)(i) of the Tax Law provides, in part:

Any local law, ordinance or resolution enacted by any city, county or school district, imposing the taxes authorized by this subdivision, shall omit . . . the clothing and footwear exemption provided for in paragraph thirty of subdivision (a) . . . of section eleven hundred fifteen, unless such city, county or school district elects otherwise as to . . . such clothing and footwear exemption. . . .

Pursuant to Chapter 82 of the Laws of 2007, effective September 1, 2007, section 1210(a)(1)(i) of the Tax Law will also provide that "Notwithstanding any provision of law to the contrary, clothing and footwear and any item used or consumed to make or repair such clothing and which becomes a physical component part of such clothing shall be exempt from sales and compensating use taxes imposed by a city of one million or more."

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 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.

\* \* \*

(30) Clothing and footwear for which the receipt or consideration given or contracted to be given is less than one hundred ten dollars per article of clothing, per pair of shoes or other articles of footwear or per item used or consumed to make or repair such clothing and which becomes a physical component part of such clothing.

Section 528.4(h)(2) of the Sales and Use Tax Regulations provides:

Medical services for human beings include but are not limited to the practices of medicine, dentistry, physical 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.

*Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items*, Publication 822 (6/01), identifies incontinence pants as medical equipment or supplies that are exempt from tax under section 1115(a)(3) of the Tax Law unless purchased for use in performing medical or similar services for compensation. Publication 822 also states in an Endnote referring to incontinence pants and surgical stockings that:

These items are exempt from State and local sales and use taxes as medical equipment unless they are purchased by a person for use in providing medical or similar services for compensation. However, when these items are purchased for such use, they are exempt from the State's (4%) sales and use taxes as articles of clothing or footwear. This exemption, however, does not apply to all locally imposed sales and use taxes. . . .

Technical Services Division Memorandum entitled *Year-Round Sales and Use Tax Exemption of Clothing, Footwear, and Items Used to Make or Repair Exempt Clothing*, March 29, 2006, TSB-M-06(6)S, identifies adult diapers as clothing that is eligible for the exemption provided in section 1115(a)(30) of the Tax Law, and also indicates that adult diapers may be exempt as medical equipment or supplies.

## **Opinion**

Adult diapers and incontinence pants (which are similar in nature to adult diapers) are considered to be both medical supplies and clothing. See Publication 822, *supra*, and TSB-M-06(6)S, *supra*. For purposes of this Opinion, it is assumed that the nursing home is a for-profit entity. A nursing home is a facility that is engaged in providing medical or similar services for compensation. See *Paul C. Maggio d/b/a Patchogue Nursing Ctr.*, Adv Op Comm T & F, October 18, 1994, TSB-A-94(49)S and section 528.4(h)(2) of the Sales and Use Tax Regulations. Therefore, purchases of adult diapers by a nursing home are not exempt from sales tax pursuant to section 1115(a)(3) of the Tax Law. However, as adult diapers are considered to be items of clothing eligible for the exemption provided in section 1115(a)(30) of the Tax Law, purchases of adult diapers by a nursing home for less than \$110 dollars per article are exempt from the State's 4% sales and use tax. See Publication 822, *supra*, and TSB-M-06(6)S, *supra*.

The exemption in section 1115(a)(30) of the Tax Law does not apply to locally imposed sales and use taxes unless the county or city imposing those taxes elected the exemption. (See section 1210(a) of the Tax Law and *Local Sales and Use Tax Rates on Clothing and Footwear*, Publication 718-C (5/07), for additional information.) The exemption also does not apply to the  $\frac{3}{8}$ % sales and use taxes imposed by the State in the Metropolitan Commuter Transportation District (MCTD), unless a county or city in the MCTD elects the exemption from its own local taxes. (See section 1109(g) of the Tax Law.) The MCTD consists of New York City and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester. Pursuant to Chapter 82 of the Laws of 2007, effective September 1, 2007, sales of clothing in New York City are fully exempt from the 4% local sales and use tax. However, sales of clothing costing \$110 or

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more per article remain subject to the New York State 4% sales and use tax and the 3/8% sales and use tax imposed by the State in the Metropolitan Commuter Transportation District.

DATED: August 27, 2007

/s/  
Jonathan Pessen  
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.