

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

TSB-A-05(36)S
Sales Tax
September 27, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050401A

On April 1, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from KCI USA, Inc., 8023 Vantage Drive, San Antonio, Texas 78230-4726.

The issues raised by Petitioner, KCI USA, Inc., are:

- 1) Whether receipts from sales of its beds are subject to the sales tax.
- 2) Whether receipts from sales of its wound closure devices are subject to the sales tax.

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

Therapeutic beds

Petitioner is in the business of selling and leasing therapeutic medical beds to acute care patients in hospital intensive care units, medical and surgical floors, skilled nursing facilities and patients' homes. These specialized medical beds are used in the treatment and prevention of disorders associated with long-term patient immobility such as pneumonia, partial or complete lung collapse, breathing and circulation problems, pressure ulcerations, skin breakdown and poor circulation. The beds are prescribed by physicians to treat patients with spinal cord injury, severe pulmonary complications, multiple trauma, severe burns, and severe pain as well as patients who have had skin grafting.

Petitioner's beds can be divided into general treatment classifications including: Kinetic Therapy, Pressure Relief and Reduction Therapies and Bariatric Support Systems. In general, Kinetic Therapy is the continuous side to side rotation of the patient. The therapy helps to prevent or treat complications associated with immobility such as pneumonia, partial or complete lung collapse, and breathing and circulation problems. This therapy is primarily used to treat patients suffering from spinal cord or head injury. Pressure Relief and Reduction Therapies provide redistribution of patient weight and reduction in surface interface pressures thereby maintaining proper blood flow. This therapy is used primarily to treat patients with pressure ulcerations (bed sores), severe burns, open wounds resulting from trauma as well as patients who have had skin grafting. Bariatric Support Systems provide pressure reducing surfaces that are manufactured to meet the needs of larger patients. These products allow the patient to maintain adequate circulation to the skin and allow the patient to position himself or herself in a cardiac chair position which helps with ventilation of the lungs.

The placement of an order for Petitioner's beds is initiated with a written prescription in the form of a doctor's order or certificate of medical necessity issued by the patient's treating

physician. Typically, the doctor's order is communicated to the purchasing agent for the facility in which the patient is being treated. Each order is for a specifically named patient as prescribed by a specific treating physician. Petitioner issues billings for the beds to the facility in which the patient is being treated.

The beds are installed by Petitioner's medical technicians who are responsible for setting the controls on the beds to the specifications of the physician in charge of the patient. The bed is then monitored periodically by Petitioner's nursing staff to ensure that the equipment is working properly. Once it is determined that the patient is no longer in need of Petitioner's bed, Petitioner's medical technicians remove it from the treatment facility, disinfect it and make the bed ready for use by the next patient. The majority of Petitioner's beds are provided to patients located in hospitals, nursing homes and other long-term care facilities.

Petitioner's beds are furnished for the treatment of one specific patient on the prescription of that patient's treating physician. The beds are intended by Petitioner to have medicinal qualities and are intended to substitute for the patient's natural movements which are the body's natural defenses against pressure ulcerations, pneumonia and partial or complete lung collapse. Patients requiring the use of Petitioner's beds typically have lost the ability to move on their own due to spinal cord injury, trauma, coma or debilitating illness.

Wound closure devices

Petitioner also sells a V.A.C.[®] (Vacuum Assisted Closure[™]) device. This device assists in wound closure by applying localized subatmospheric pressure that helps promote wound healing. V.A.C. therapy is applied to a special dressing positioned in the wound cavity or over a graft. This pressure-distributing wound packing helps remove fluids from the wound and promote the normal healing process.

The V.A.C. system consists of an open-cell reticulated foam. The foam can be cut to the shape of smaller wounds or multiple pieces of foam can be placed side-to-side or on top of each other to treat large surface area wounds or deep wounds. A fenestrated (porous) evacuation tube embedded in the foam allows the application of subatmospheric pressure to the wound. This evacuation tube allows for the removal of excess fluid which can contain excess bacteria, undesirable enzymes and the like. The dressing and the distal evacuation tube are covered by a transparent, occlusive, air permeable drape. The drape provides a seal which allows the application of subatmospheric pressure to the system.

The free end of the evacuation tube is attached to a longer tube ending in a collection canister. The canister acts as a limited reservoir to contain the fluid being removed from the wound. The canister fits into a microprocessor-controlled vacuum unit. The vacuum unit provides continuous or intermittent subatmospheric pressure selected to meet the needs of the wound being treated.

V.A.C. therapy provides all the benefits of high technology dressings in one system. The standard dressing change routine of every 48 hours can result in less disturbance to the wound, improved patient comfort and faster wound closure than traditional dressings.

Applicable law and regulations

Section 1101(b)(5) of the Tax Law defines the term *sale, selling or purchase* for purposes of Article 28 of the Tax Law as follows:

Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

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.

Section 1116(a) of the Tax Law provides for exemption from the sales and compensating use taxes with respect to purchases by New York State governmental entities, United States governmental entities, certain nonprofit organizations and other entities who have received New York State sales tax exempt organization status.

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

Drugs and medicines; medical equipment and supplies. (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 (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.

Example 1: Items such as hospital beds, wheel chairs . . . iron lungs, respirators, oxygen tents, crutches, back and neck braces, trusses, trapeze bars, walkers, inhalators, nebulizers and traction equipment are exempt medical equipment.

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.

Example 3: Orthodontic appliances are medical equipment.

Example 4: The purchase of a birth control device commonly known as an I.U.D. or intrauterine device is the purchase of medical equipment.

(3) Replacement parts for medical equipment are exempt from tax provided such replacement parts are identifiable as medical equipment replacement parts. If a replacement part is not identifiable as a part for medical equipment, the purchaser must pay the tax at the time of purchase. The purchaser may then apply directly to the Sales Tax Bureau for a refund of the tax paid provided he can show that the part was used to replace a defective part on exempt medical equipment.

(4) Medical equipment is not exempt if purchased by a person performing medical or similar services for compensation. (See subdivision (g) of this section.)

* * *

(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.

Example 1: Colostomy bags and the necessary accoutrements required for attachment are medical supplies.

Example 2: Bandages, gauze and dressings are medical supplies.

Example 3: Disposable hypodermic syringes and litmus paper used by diabetics are medical supplies.

(2) Medical supplies are not exempt if purchased by a person performing medical or similar services for compensation. (See subdivision (h) of this section.)

(h) Taxable medical equipment and supplies. (1) Medical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax.

Example 1: Stethoscopes, syringes, wheel chairs, etc. purchased by physicians are not exempt.

Example 2: Resuscitators, stretchers and other such equipment purchased by an ambulance service are not exempt.

Example 3: Bandages, gauze, dressings, etc., are not exempt when purchased by a physician, ambulance service or other person who will use them in performing a medical service for compensation.

* * *

(2) 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.

(3) It is immaterial whether the compensation is paid to the practitioner or institution by the patient or another source.

(i) Servicing and repairing medical equipment. (1) Servicing and repairing medical equipment which is exempt from tax under subdivision (e) of this section is exempt from the tax imposed by paragraph (3) of subdivision (c) of section 1105 of the Tax Law.

(2) Servicing and repairing medical equipment which is not exempt is subject to the tax imposed by paragraph (3) of subdivision (c) of section 1105 of the Tax Law.

Section 529.2(b) of the Sales and Use Tax Regulations provides, in part:

As purchaser. (1) New York State, or any of its agencies, instrumentalities, public corporations or political subdivisions (hereinafter referred to as New York State governmental entities) are not subject to sales or use tax when they are the purchaser, user, or consumer of tangible personal property or services

Section 529.3(b) of the Sales and Use Tax Regulations provides, in part:

As purchaser. (1) The United States of America, and any of its agencies and instrumentalities immune from taxation (hereinafter referred to as United States governmental entities) are not subject to the sales or use tax when they are the purchaser, user or consumer of tangible personal property or services

Section 529.7 of the Sales and Use Tax Regulations provides, in part:

Religious, charitable, scientific, testing for public safety, literary or educational organizations, organizations which foster national or international amateur sports competition, and organizations for the prevention of cruelty to children or animals.

(a) General. (1) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation (except as otherwise provided in subsection (h) of section 501 of the United States Internal Revenue Code of 1986), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office, which meet the qualifications of this section are exempt from the sales and use tax on any purchases of tangible personal property, [or] services

Opinion

Issue 1

Petitioner describes its beds as therapeutic medical beds prescribed by physicians to treat patients with various medical conditions. Petitioner's beds as described in this Advisory Opinion

qualify as medical equipment pursuant to section 1115(a)(3) of the Tax Law. See section 528.4(e) of the Sales and Use Tax Regulations. Unlike the furniture predominantly marketed and sold to individuals for use regardless of medical necessity which has been determined in *Matter of Craftmatic Comfort Manufacturing Corp. v New York State Tax Commn.*, 69 NY2d 755, [1987] to not qualify for exemption from sales tax under section 1115(a)(3) of the Tax Law, Petitioner's equipment is typically only available pursuant to a physician's recommendation and prescription. Upon such physician's recommendation, the equipment is leased by the patient's hospital, long-term care facility, hospice provider, etc. for use by the specified patient. The use of the equipment is monitored by Petitioner's personnel and when no longer needed by a specified patient the equipment is retrieved by Petitioner for preparation for use by subsequent patients.

The exemption in section 1115(a)(3) of the Tax Law for medical equipment and supplies does not apply to retail sales of such equipment and supplies for use by the purchaser in performing medical or similar services for compensation. See section 528.4(e)(4) of the Sales and use Tax Regulations. Leases or rentals are included in the definition of *sale, selling* or *purchase* for sales tax purposes. See section 1101(b)(5) of the Tax Law.

Accordingly, if Petitioner makes retail sales or leases of its hospital beds to persons other than a person who uses the bed in performing medical or similar services for compensation, or to an otherwise exempt entity, Petitioner is not required to collect sales or use tax on such sale. See sections 1115(a)(3) and 1116(a) of the Tax Law and sections 528.4(h)(1), 529.2, 529.3, and 529.7 of the Sales and Use Tax Regulations. Petitioner should maintain records showing that it sold or leased the bed directly to the exempt purchaser. Such record should include a copy of Petitioner's invoice made out to the patient, or, in the case of sales to exempt entities, a copy of the governmental purchase order or *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1). It appears from the facts in this Opinion that Petitioner is renting its beds to persons performing medical or similar services for compensation. Such rentals are taxable, unless the purchaser is an exempt entity under section 1116(a) of the Tax Law.

Issue 2

Petitioner's V.A.C.® (Vacuum Assisted Closure™) device as described in this Advisory Opinion also qualifies as medical equipment pursuant to section 1115(a)(3) of the Tax Law. Accordingly, if Petitioner makes retail sales or leases of V.A.C. devices to persons other than a person who uses the device in performing medical or similar services for compensation, or to an otherwise exempt entity, Petitioner is not required to collect sales or use tax on such sale. See sections 1115(a)(3) and 1116(a) of the Tax Law and sections 528.4(h)(1), 529.2, 529.3, and 529.7 of the Sales and Use Tax Regulations. Petitioner should maintain records showing that it sold or leased the device directly to the exempt purchaser. Such record should include a copy of Petitioner's invoice made out to the patient, or, in the case of sales to exempt entities, a copy of the governmental purchase order or *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1). It appears from the facts in this Opinion that Petitioner is renting its devices to

TSB-A-05(36)S
Sales Tax
September 27, 2005

persons performing medical or similar services for compensation. Such retail sales or rentals are taxable, unless the purchaser is an exempt entity under section 1116(a) of the Tax Law.

DATED: September 27, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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