

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(13)S
Sales Tax
March 9, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090203A

On February 3, 2009, the Department received a petition for an advisory opinion from [REDACTED]. Petitioner asks if its sales of ParaGard® intrauterine devices qualify for exemption from sales tax as drugs and medicines under Tax Law §1115(a)(3). Because the State classifies ParaGard® intrauterine devices (IUDs) as medical equipment, the sale of the ParaGard® IUD to patients is exempt from sales tax, but its sale to medical providers is not.

Facts

Petitioner supplies drugs, medicines, medical equipment and supplies to medical services providers and patients. Among the products that it sells is the ParaGard® IUD. Because a physician's order is required for the purchase of the product, sales to both medical services providers and patients are shipped to physicians or medical facilities. Petitioner concedes that the U.S. Food and Drug Administration (USFDA) has classified the ParaGard® IUD as a medical device.

Petitioner represents that the ParaGard IUD is a plastic T-shaped device that is wrapped in copper wire. The IUD has a federal warning label that restricts it to sale by or on the order of a physician. The IUD is inserted by a physician into the uterus of the patient. The IUD may remain implanted in the woman's uterus for up to 10 years. The function of the "copper-bearing" IUD is to kill the sperm. It releases copper ions, and copper is toxic to sperm. The copper-bearing IUDs interfere with fertilization and make the uterus a "spermicidal environment." The copper helps to prevent eggs from implanting in the uterus, and it stimulates the production of prostaglandins, which are chemicals that affect the hormones needed to support a pregnancy. The IUD may also be used as an emergency contraceptive to prevent pregnancy for up to 5 days after having unprotected sexual intercourse.

Issue

Do Petitioner's sales of the ParaGard® IUD qualify for the sales tax exemption provided for drugs and medicines under Tax Law §1115(a)(3)?

Analysis

No, Petitioner's sales of the ParaGard® IUD do not qualify for the sales tax exemption provided for drugs and medicines under Tax Law §1115(a)(3).

Petitioner argues that the function, performance, and effect of the ParaGard® IUD on a woman's uterus through the release of copper ions are similar to those of other forms of birth control, including the birth control pill and the morning-after pill, that the State has classified as drugs, and that it therefore should be classified as a drug. Notably, Petitioner does not claim, nor could it, that its product has been

recognized as a drug or medicine in the *United States Pharmacopeia*, *Homeopathic Pharmacopeia of the United States*, or *National Formulary*, which could classify it as a drug or medicine pursuant to 20 NYCRR 528.4(b)(1)(i). Instead, Petitioner claims that the copper ions released by its IUD are “intended to affect the structure or any function of the human body,” bringing it within the definition of drugs and medicines included within 20 NYCRR 528.4(b)(1)(ii).

Petitioner seeks to circumvent the findings of the USFDA and the medical reference works, cited in 20 NYCRR 528.4(b)(1)(i) as authoritative with respect to the recognition of products as drugs and medicines, with an argument concerning its product’s function, performance, and effect that might bring it within the definition of drugs and medicines for purposes of Tax Law §1115(a)(3). However, statutory exemptions are construed narrowly against the taxpayer. See *Allied New York Services, Inc. v Tully* (3d Dept 1981) 83 AD2d 727, 728. The USFDA classification of the ParaGard® IUD as a device supports the conclusion that this IUD is not a drug or medicine within the commonly understood meaning of these terms, regardless of the effect that copper ions may have in preventing pregnancy. Further, the IUD is not a product consumed by humans for the preservation of health, for purposes of Tax Law §1115(a)(3). Rather, the IUD is medical equipment. See 20 NYCRR 528.4(e), Example 4, which specifically cites IUDs, without regard to type or brand, as an example of medical equipment.

(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 incapacity.

* * *

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.

While Tax Law §1115(a)(3) provides that medical equipment is exempt from sales tax, this section also provides that the exemption does not apply when the medical equipment is sold at retail to medical services providers for use in performing medical and similar services for compensation.

See 20 NYCRR 528.4(e) and Departmental publications that have consistently included IUDs on the list of medical equipment. See Publication 822, *Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items* (6/01); Publication 840, *Guide To Sales Tax For Drugstores and Pharmacies* (8/98), pp. 11, 29.

There appear to be neither statutory nor precedential grounds for treating one type or brand of IUD differently than another. Thus, sales of the ParaGard® IUD are considered sales of medical equipment: exempt upon sale to patients, but taxable when sold to medical services providers.

DATED: March 9, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.