

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

TSB-A-09(48)S
Sales Tax
October 14, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090730A

Petitioner [REDACTED], asks whether sales of Collagen Implant for use by medical practitioners in the treatment of urinary incontinence are subject to sales tax.

We conclude that the Collagen Implant is a medical/surgical supply item subject to sales tax when purchased by medical practitioners for use in the performance of medical services for compensation.

Facts

Petitioner sells its medical product, Collagen Implant, to customers (distributors, hospitals, medical centers, medical practitioners, etc.). The implant is intended for use only in the treatment of urinary incontinence due to intrinsic sphincter deficiency (poor or nonfunctioning bladder outlet mechanism) that may be helped by a locally injected bulking agent. The implant is a sterile nonpyrogenic device composed of highly purified bovine dermal collagen that is lightly crosslinked with glutaraldehyde and disbursed in phosphate-buffered physiological saline. The implant is injected into the submucosal tissue of the urethra and or bladder neck, and into the tissue adjacent to the urethra. The injected product creates increased tissue bulk and subsequent coaptation of the urethral lumen. After injection, the collagen forms a soft cohesive network of fibers. Over time the implant takes on the appearance of normal host tissue. If incontinence persists after the initial treatment or if improvement is followed by recurrence of symptoms, treatment may be repeated after a minimum of seven days from the last treatment. Patients are counseled that the implant therapy is not a one-time or permanent therapy and that most patients will need additional treatment sessions to achieve and maintain improvement or dryness.

Analysis

The Tax Law provides exemptions from sales and use tax for drugs and medicines intended for use in the cure, mitigation, treatment or prevention of illness or disease in humans; and for medical equipment (including component parts thereof) and supplies required for use in the cure, mitigation, treatment or prevention of illness or disease, or to correct or alleviate physical incapacity. The exemption does not apply to medical equipment and supplies purchased at retail for use in providing medical and similar services for compensation or to purchases of cosmetic products notwithstanding the presence of medicinal ingredients in the cosmetic product. (*See Tax Law Section 1115(a)(3).*)

The Tax Law also provides an exemption for prosthetic aids, artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in humans. (*See Tax Law Section 1115(a)(4).*) The Sales and Use Tax Regulations describe prosthetic aids and artificial devices, and component parts thereof, purchased to correct or alleviate physical incapacity in human beings as property that either completely or partially replaces a missing body part or the function of a permanently inoperative or permanently malfunctioning body part and that is primarily and customarily used for such

purposes. Property that is generally useful in the absence of illness, injury or physical incapacity does not qualify for the prosthetic aid/ artificial device exemption. (See Regulation Section 528.5)

The Collagen Implant is a medical supply for purposes of Section 1115(a)(3) of the Tax Law, rather than a prosthetic aid or artificial device for purposes of Section 1115(a)(4).

The Appellate Division in *Dental Society of the State of New York v. New York State Tax Commission*, 110 A.D.2d 988 (1985) held that cavity filling materials, although implanted in patients' teeth, were not prosthetic aids exempt from sales tax under Section 1115(a)(4) of the Tax Law. In *Orthovita, Inc. Adv Op Comm Tx & Fin*, June 25, 2002 TSB-A-02(14)S, a surgically implanted injectable bone filler, regulated as a "device," used in the repair of the porous inner core of bone, which served as a template to guide bone regeneration, was determined to be a surgical supply subject to tax when purchased for use in the provision of medical services for compensation. Sutures, non-cross linked collagen ophthalmic shields, and absorbable tissue regeneration devices have likewise been determined to be medical supply items used and consumed by the medical practitioner in performing medical procedures. The Collagen Implant in the present case is similar to these medical supply items. See *Alcon Laboratories, Inc.*, Adv Op Comm Tx & Fin, August 2, 1991, TSB-A-91(54)S; *Alcon Surgical Inc.*, Adv Op Comm Tx & Fin, May 27, 1992, TSB-A-92(43)S; and *John O. Butler Company*, Adv Op Comm Tx & Fin, November 4, 1992, TSB-A-92(77)S).

Petitioner's implant injections need to be repeated and the treatment is neither one-time nor permanent. This implies that the product is absorbed by the body rather than becoming a replacement for a permanently malfunctioning body part. Accordingly, the Collagen Implant is a medical supply for purposes of Section 1115(a)(3) of the Tax Law, rather than a prosthetic aid or artificial device exempt from tax under Section 1115(a)(4) of the Tax Law.

Even presuming that the medical practitioners will use the Collagen Implant in the treatment, cure, prevention, etc. of illness and disease and the alleviation of physical incapacity, the exemption under Section 1115(a)(3) of the Tax Law is nonetheless inapplicable to purchases of the implant by the medical practitioners for their use in their performance of medical services for compensation. Because Petitioner's Collagen Implant is a medical supply item, purchases of the implant by medical practitioners are subject to sales tax under section 1105(a) of the Tax Law.

DATED: October 14, 2009

/S/

Jonathan Pessen
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