

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

TSB-A-10(58)S
Sales Tax
November 16, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101013A

On October 13, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether sales of products from its antibacterial product line are exempt from sales and use tax pursuant to Tax Law §1115(a)(3) and 20 N.Y.C.R.R. §528.4 as drugs intended to mitigate and prevent disease in humans.

We conclude that Petitioner's antibacterial products are cosmetic and toilet articles, notwithstanding the presence of medicinal ingredients, and that receipts from the sales of these products are tangible personal property subject to State and local sales taxes.

Facts

Petitioner is a retailer that markets and sells, among other products, a line of antibacterial gels, soaps, and sanitizers, including the following: Anti-Bacterial Hand Spray, Anti-Bacterial Moisturizing Hand Lotion, Anti-Bacterial Hand Gel Sanitizer, Deep Cleansing Hand Gel, Anti-Bacterial Hand Foam, Anti-Bacterial Deep Cleansing Hand Soap, Anti-Bacterial Hand Gel Sanitizer, Anti-Bacterial Gentle Foaming Hand Soap, Anti-Bacterial Moisturizing Hand Soap, Anti-Bacterial Deep Cleansing Hand Soap, and Anti-Bacterial Gentle Foaming Hand Soaps. Each of the products' drug facts label lists an active ingredient of either alcohol, between 68% - 72%, or triclosan 0.3%; identifies its purpose as "Antiseptic;" and describes its use as "to decrease bacteria" on hands or skin. The product labels variously indicate that the products leave hands "feeling clean and virtually germ-free;" "clean, soft and virtually germ-free;" "clean, lightly scented and virtually germ-free;" "deeply cleansed and feeling smooth and soft;" "clean and conditioned;" "gently cleansed and conditioned;" "lightly scented, feeling moisturized and looking younger, while effectively fighting germs;" "lightly scented, deeply cleansed and feeling smooth and soft, while effectively fighting germs;" and "lightly scented, gently cleansed and conditioned, while effectively fighting germs." Many of the products also tout their skin nourishing and softening effects.

Petitioner notes that alcohol and triclosan are considered drugs by the United States Food and Drug Administration ("FDA") and that the FDA has included them, in proposed rules, among the antiseptics contained in topical antibacterial products that help mitigate the risk of disease and infection. Petitioner avers that the products are marketed for their antibacterial properties and that customers purchase the products to avoid illness.

Analysis

All retail sales of tangible personal property are subject to sales tax pursuant to Tax Law §1105(a), unless otherwise exempted. Tax Law §1115(a)(3) provides an exemption for "[d]rugs and medications intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses in human beings ... and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein...."

The Sales and Use Tax Regulations define “drugs and medicines” as “articles, whether or not a prescription is required for purchase, which are recognized as drugs or medicines in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary, and intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans;” and provides that “(2) [t]he base or vehicle used (oil, ointment, talc, etc.) and the medium used for delivery (disposable wipe, syringe, saturated pad, etc.) of a drug or medicine will not affect its exempt status.” 20 N.Y.C.R.R. § 528.4(b)(1) The regulation lists “antiseptics” among the examples of exempt products.

The regulations define “cosmetics” as “[a]rticles intended to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles are subject to tax.” “Toilet articles” are defined as “[a]ny article advertised or held out for grooming purposes and those articles which are customarily used for grooming purposes, regardless of the name by which they may be known are subject to tax. Example: Soap, toothpaste and hair spray are taxable toilet articles.” 20 N.Y.C.R.R. §528.4(d).

Based upon the Petitioner’s product labeling, if the relevant antiseptic ingredient, either alcohol or triclosan, were removed from each of the Petitioner’s antibacterial products, they would be classified as cosmetics or toilet articles (“toiletries”) and thus not within the exemption in Tax Law §1115(a)(3). The products are expressly designed to cleanse, beautify or promote attractiveness of a purchaser, or for grooming purposes, as contemplated by 20 N.Y.C.R.R. §528.4(c) and §528.4(d), respectively.

The question for resolution is whether the addition of the antiseptic ingredients to these cosmetics and toiletries transforms them into drugs and medicines eligible for the §1115(a)(3) sales tax exemption. It does not. Tax Law §1115(a)(3) and 20 N.Y.C.R.R. §528.4(a)(3) directly address this issue by providing that cosmetics and toiletries are taxable “notwithstanding the presence of medicinal ingredients therein.” See *Moore Medical LLC*, Adv Op Comm T&F, April 16, 2006, TSB-A-06(13)S; *Skin Culture Institute, Inc.*, Adv Op Comm T&F, August 4, 1999, TSB-A-99(38)S. Cf. *Mannatech Incorporated*, Adv Op Comm T&F, July 25, 2002, TSB-A-02(36)S (lotions were deemed taxable cosmetics, but antiseptic gel the sole purpose of which was the treatment of “minor burns, scratches, cuts, insect bites, and other minor skin conditions to help prevent against infection,” was found to be exempt from sales tax). The fact that the presence of medicinal ingredients enhances the products’ sales potential and enables the Petitioner to differentiate its products in the marketplace does not override the express language of the statute and regulation.

DATED: November 16, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and 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.