

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

TSB-A-12(14)S
Sales Tax
July 5, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S111025D

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks what is the definition of an acne preparation and what products qualify as acne preparations, in particular naming five specific products.

We conclude that the five products are acne preparations and are exempt from sales tax.

Facts

Petitioner is a retailer that sells, among other products, acne products, including the following: St. Ives Naturally Clean Blemish & Blackhead Control Apricot Scrub, Clearasil Ultra Rapid Actions Pads, Clean & Clear Blackhead Eraser Face Scrub, OXY Maximum Face Wash, and Clean & Clear Persa Gel 10. Each of the products lists an active ingredient of 10% benzoyl peroxide or 2% salicylic acid, as well as a statement that the active ingredient is either an acne medication or treatment. The product labels variously indicate that the products are or do the following: “see fewer blackheads in two days;” “gently exfoliates to lift dirt and oil away;” “reduces redness and pimple size in as little as 4 hours;” “exfoliates to prevent blemishes and cleans pores;” and “the same acne medication prescribed by doctors.”

Petitioner notes that New York State Department of Taxation and Finance (“Department”) Publication 840, *A Guide to Sales Tax for Drugstores and Pharmacies*, lists acne preparations as an exempt “medicinal product.”

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 medicines 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 “(6) [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 specifies in example 4 that “acne preparations, including acne soaps, are exempt provided they contain a recognized drug or medicine.”

The five specific products referenced by Petitioner expressly claim to treat topical acne. In determining whether these products are acne preparations, the Department looks to guidance from the U.S. Food and Drug Administration. Its regulations provide a list of acne active ingredients in topical acne drug products. *See* 21 C.F.R. § 333.310 This list includes benzoyl peroxide up to 10% and salicylic acid up to 2%. Because the active ingredient contained in these five products is either 10% benzoyl peroxide or 2% salicylic acid, the five products contain a recognized drug or medication for treating acne under 20 N.Y.C.R.R. § 528(b)(3). Consistent with the guidance in Publication 840, these products are acne preparations and are exempt from sales tax.

DATED: July 5, 2012

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.