

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether various products it sells, including lotions, powders, an acne clearing kit, and glucose tablets, are subject to sales tax.

We conclude that most of the products Petitioner describes are subject to sales tax. However, three products described below (i.e., Aveeno Active Naturals® Clear Complexion, Gold Bond® Medicated Maximum Strength Powder, and Dex 4® Fast Acting Glucose Tablets) are exempt from sales tax.

Facts

Petitioner is a retailer that markets and sells, among other products, the following: Aveeno Active Naturals® Daily Moisturizing Lotion, Gold Bond® Medicated Anti-Itch Lotion, Gold Bond® Medicated Extra Strength Lotion, Aveeno Active Naturals® Clear Complexion, Gold Bond® Medicated Extra Strength Body Powder, Johnson’s® Medicated Baby Powder, Gold Bond® Medicated Maximum Strength Powder, Acne Free® Acne Clearing System, and Dex 4® Fast Acting Glucose Tablets.

Aveeno Active Naturals® Daily Moisturizing Lotion is a moisturizer. Its label states it is proven to “relieve dry skin” and “moisturize” for 24 hours.” It also claims to make skin “soft, smooth and naturally healthy-looking.” This product’s packaging states that it “temporarily protects and helps relieve chafed, chapped or cracked skin” and “helps protect from the drying effects of wind and cold weather.”

Gold Bond® Medicated Anti-Itch Lotion is an anti-itch lotion for “Fast Lasting Itch Relief.” The label states it is used to temporarily protect and relieve chapped or cracked skin for temporary relief of pain and itching associated with, among other things, minor skin irritations, cuts, burns, sunburns, and rashes due to poison ivy.

Gold Bond® Medicated Extra Strength Lotion is a body lotion used for the same purposes as Gold Bond® Medicated Anti-Itch Lotion.

Aveeno Active Naturals® Clear Complexion is sold as a “daily moisturizer” and “salicylic acid blemish treatment.” The packaging states it contains salicylic acid “to help clear

up and help prevent blemishes.” Its active ingredient is salicylic acid (0.5%) and its purpose is described as “Acne Medication.”

Gold Bond® Medicated Extra Strength Body Powder is a body powder used to temporarily relieve the pain and itch associated with minor cuts and burns, sunburn, insect bites, scrapes, prickly heat, rashes and minor skin irritations.

Johnson’s® Medicated Baby Powder is a baby powder used to treat and prevent diaper rash and to protect chafed skin due to diaper rash and help seal out wetness. Its label states it is a “medicated zinc oxide skin protectant.” Its label also states as follows: “3 way action protects, treats & soothes irritated skin.”

Gold Bond® Medicated Maximum Strength Powder is a foot powder used to temporarily relieve the pain and itch associated with minor skin irritations on the foot, to provide maximum strength itch relief, absorb excess moisture, control foot odor and odor-causing bacteria and to cool and soothe irritated skin.

Acne Free® Acne Clearing System is an acne clearing system that includes an oil-free cleanser, renewing toner and repair lotion. All three items are labeled as “clear skin treatments” and the cleanser and repair lotion both contain benzoyl peroxide (2.5% and 3.7% respectively). The renewing toner is labeled as helping to reduce oil and refine pores. The box containing the kit is labeled to treat all stages of acne 24 hours a day.

Dex 4® Fast Acting Glucose Tablets is a jar of 50 glucose tablets that the label states raises low blood sugar fast and boosts energy. The directions instruct to “[c]hew desired amount of glucose.”

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 or diseases 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” See TB-ST-193 (August 5, 2014); TSB-A-10(58)S.

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”. 20 NYCRR 528.4(b)(1). The Regulations also provide that “[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 NYCRR 528.4(b)(2).

Other medicinal products used for the preservation of health, and products that are intended to affect the structure or function of the human body are also exempt from sales tax. *See id.* These products include, among others, acne preparations, lip balm intended to treat or prevent chapped lips, products that prevent or treat athlete’s foot or other fungus infections, and sunscreens. *Id.*

“Cosmetics” are “[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” 20 NYCRR 528.4(c). Cosmetics are taxable, “notwithstanding the presence of medicinal ingredients therein.” 20 NYCRR 528.4(a)(3). “Toilet articles” are “[a]ny articles 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” 20 NYCRR 528.4(d). Taxable cosmetics and toiletries include, among others, astringents, baby powder, talcum powder, creams and lotions such as hand and body lotion, moisturizers and face cream, pore cleansers and makeup. *See* TSB-ST-193.

Aveeno Active Naturals® Daily Moisturizing Lotion is labeled as a daily moisturizing lotion used to protect and help cracked and drying skin. Gold Bond® Medicated Anti-Itch Lotion is labeled as an anti-itch lotion used for, among other things, cracked or chapped skin and poison ivy, oak or sumac. Gold Bond® Medicated Extra Strength Lotion is labeled as a body lotion used for extra dry and itchy skin. These products are all lotions intended to be rubbed on for beautifying purposes, and not for use in curing, mitigating or preventing illness or disease. Accordingly, they are taxable cosmetics. *See* Tax Law § 1115(a)(3), 20 NYCRR 528.4(a); *Drugstores and Pharmacies* TB-ST-193.

Aveeno Active Naturals® Clear Complexion is labeled as a “daily moisturizer” and “salicylic acid blemish treatment.” The relevant regulation specifies in Example 4 that “[a]cne preparations, including acne soaps, are exempt provided they contain a recognized drug or medicine.” In determining whether a product qualifies as an acne preparation exempt from sales tax, the Department looks to guidance from the U.S. Food and Drug Administration (FDA). The FDA regulations provide a list of acne active ingredients in topical acne drug products. *See* 21 CFR 333.310. This list includes salicylic acid from 0.5% up to 2%. Because the active ingredient in Product B is salicylic acid (0.5%) and its label lists its purpose as “acne medication,” we conclude that this product is exempt from sales tax.

Gold Bond® Medicated Extra Strength Body Powder is a powder that is labeled as cooling, absorbing and itch relieving. Its purposes are listed as “anti-itch” and “skin protectant” and its main ingredient is talc. Johnson’s® Medicated Baby Powder is corn starch-based baby powder that is augmented with “zinc oxide skin protectant,” and is advertised to protect, treat and soothe irritated skin. Both of these products are cosmetics or toiletries subject to sales tax. *See Drugstores and Pharmacies*, TB-ST-193. The presence of a protective ingredient does not transform these products into drugs or medicines. *See TSB-A-10(58)S*.

Gold Bond® Medicated Maximum Strength Powder is a foot powder that is labeled as relieving itch, absorbing excess moisture and controlling foot odor. Its uses are described as temporarily relieving the pain and its associated with minor skin irritation, absorbing excess moisture, and helping to control foot odor and odor-causing bacteria. Foot powders that eliminate excessive perspiration and prevent athlete’s foot and other fungal infections are exempt, but foot powders that act only as deodorants are taxable. *See NYCRR 528.4 (b)(3), Example 8*. Because this product is not merely a deodorant, but absorbs excess moisture and helps to prevent the growth of odor-causing bacteria, it is exempt from sales tax.

Acne Free® Acne Clearing System is an acne clearing kit that includes a purifying cleanser, renewing toner and repair lotion. Acne preparations are tax exempt provided they contain a recognized drug or medicine. 20 NYCRR 528.4(b). The cleanser contains 2.5% benzoyl peroxide and the repair lotion contains 3.7% benzoyl peroxide. The U.S. Food and Drug Administration provides that benzoyl peroxide from 2.5% to 10% is an acne active ingredient. Because the active ingredient contained in the cleanser and repair lotion contain a recognized drug or medication for treating acne under 20 NYCRR 528(b)(3), those components the Acne Clearing Kit are acne preparations exempt from sales tax. However, the renewing toner does not contain a recognized acne medication. Among its ingredients are witch hazel, an astringent. It is applied to the human body for beautifying and to promote attractiveness and therefore, is a cosmetic subject to tax. *See NYCRR 528.4(c)*. When tangible personal property composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price. 20 NYCRR 527.1(b). Accordingly, because the Acne Clearing System is sold as a single unit, the receipts from the sale of the entire product are subject to tax.

Receipts from dietary foods and health supplements sold for human consumption are exempt from sales tax. Tax Law § 1115(a)(1). “A dietary food is a food for a special dietary use for humans and which bears on the label a statement of the dietary properties upon which its use is based in whole or in part.” 20 NYCRR 528.2(c). Products intended to substitute or supplement the ordinary diet or substitute for natural foods, including liquid diet products, artificial sweeteners, and vitamins are exempt when sold for human consumption. 20 NYCRR 528.2(c). Dex 4® Fast Acting Glucose Tablets is a dietary product that contains glucose, a type of sugar. Its package bears a “Nutrition Facts” label of its dietary properties upon which its use

is based. Accordingly, it is a dietary food or health supplement that is exempt from tax. *See* Tax Law § 1115(a)(1); 20 NYCRR 528.2(c).

DATED: October 20, 2020

/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.