

New York State Department of Taxation and Finance  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-92 (77) S  
Sales Tax  
November 4, 1992

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920728B

On July 28, 1992, a Petition for Advisory Opinion was received from John O. Butler Company, 4635 W. Foster Avenue, Chicago, Il 60630.

The issue raised by Petitioner, John O. Butler Company, is whether Petitioner's sales of a bio-medical device to dentists for reconstructive surgery resulting from periodontal disease is exempt from sales tax as a prosthetic aid within the meaning of Section 528.5 of the New York State Sales and Use Tax Regulations.

The bio-medical device which will be introduced in New York State will be sold to dentists (periodontists and general practitioners) for reconstructive surgery resulting from periodontal disease. In the industry, the bio-medical device is referred to as a "Guided Tissue Regeneration" (hereinafter "GTR") device and is subject to FDA approval as a class II medical device defined by a 510K submission.

The GTR device is a foil-thin, perforated device with pre-attached sutures which are used to fasten around the neck of a tooth. The GTR device is placed beneath a patient's gums in the area where bone and periodontal ligament loss occurred. The purpose of the device is to enable and guide the regeneration of periodontal tissues lost due to disease.

The primary difference between the GTR device and the only other device currently on the market is that the GTR device is bio-absorbable and is not removed from the patient's mouth. Rather, the body hydrolyzes the device over time. The device is made of a polylactic acid.

Section 1105(a) of the Tax Law imposes sales tax upon "[T]he receipts from every sale of tangible personal property, except as otherwise provided in this article."

Sec. 1115. Exemptions from sales and use taxes.--(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including

component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings. (emphasis added)

Section 528.4 of the Sales and Use Tax Regulations, provides, in part, as follows:

(a) Exemption

(1) Drugs and medicines intended for the use, internally or externally in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the ..... preservation of health are exempt.

\* \* \*

(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 physical incapacity.

(g) Supplies

(1) Supplies used in the cure, mitigation, treatment or prevention of illnesses or diseases or for the correction and alleviation of physical incapacity are exempt.

\* \* \*

(2) Medical supplies are not exempt if purchased by a person performing medical or similar services for compensation. (See subdivision (h) of this section.)

(h) Taxable medical equipment and supplies

(1) Medical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax.

\* \* \*

Example 4: Dental supplies such as porcelain, mercurial alloy, gold, silver, acrylic denture base, amalgam, composite resin, silicate, and dental floss are not exempt when purchased by a dentist who will use them in performing a dental service for compensation.

(2) Medical services for human beings include but are not limited to the practices of medicine, dentistry, physical therapy, chiropractic, nursing, podiatry, optometry and whether performed by a private practitioner, clinical laboratory, hospital, nursing home, ambulance service, clinic, or health maintenance facilities.

(3) It is immaterial whether the compensation is paid to the practitioner or institution by the patient or another source.

Section 528.5 of the Sales and Use Tax Regulations provides, in part, as follows:

§ 528.5 Prosthetic aids

(a) Exemption. Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof, purchased to correct or alleviate physical incapacity in human beings are exempt from the tax.

(b) Qualification

(1) In order to qualify as a prosthetic aid, a hearing aid, eyeglasses or an artificial device, the property must either completely or partially replace a missing body part of the function of a permanently inoperative or permanently malfunctioning body part and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity.

Example 1: Artificial hands, arms, legs, false teeth, etc. are exempt.

Example 2: Breast forms for post-mastectomy patients are exempt from tax. Garments with permanently built-in breast forms intended for use by post-mastectomy patients are also exempt as a prosthesis. However, brassieres worn with breast forms are not exempt.

\* \* \*

Example 4: A crown which is permanently attached to a tooth by a dentist is exempt. (emphasis added)

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The Appellate Division in *Dental Society of the State of New York v. New York State Tax Commission*, 110 A.D.2d 988 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 *Alcon Surgical, Inc., Adv Op Comm T&F*, May 27, 1992, TSB-A-92(43)S the Commissioner advised the corneal shield used to accelerate healing in postoperative or traumatic corneal injuries, refractive surgical procedures and other corneal conditions which subsequently dissolved in the eye was not a drug or medicine but a medical supply for purposes of the exemption contained in Section 1115(a)(3) of the Tax Law since it was a therapeutic device similar to ophthalmic suture materials.

The GTR device which fastens around the neck of a tooth to guide in the regeneration of periodontal tissues lost due to disease and later dissolves in the patient's mouth is not a prosthetic aid but is a medical supply for purposes of the exemption contained in Section 1115(a)(3) of the Tax Law. This opinion is supported by Section 1115(a)(3) and (4) of the Tax Law, Sections 528.4 and 528.5 of the Sales and Use Tax Regulations, *Dental Society of the State of New York v. New York State Tax Commission*, supra, and *Alcon Surgical, Inc.*, supra. Accordingly, pursuant to Section 1115(a)(3) of the Tax Law and Section 528.4 of the Sales and Use Tax Regulations the receipts from the sale of the GTR device to other than those purchasing the device at retail for use in performing medical or dental services for compensation is exempt from sales tax.

It is noted that the sale of such GTR device to a hospital or other organization qualifying for exemption under Section 1116(a) of the Tax Law would be exempt from the imposition of sales tax even if such entity was using the device in performing medical services for compensation provided they provide a properly completed exemption certificate.

DATED: November 4, 1992

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions  
are limited to the facts set forth therein.