

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(3)S
Sales Tax
January 31, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040412A

On April 12, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Michael Bozimowski, BDO Seidman, LLP, 755 West Big Beaver, Suite 1900, Troy, Michigan, 48084. Petitioner, Michael Bozimowski, BDO Seidman, LLP, provided additional information pertaining to the Petition on August 26, 2004.

The issue raised by Petitioner is whether charges for laser hair removal services performed in New York City are subject to the sales tax imposed by New York City pursuant to section 1212-A(a)(2) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

A company (Company) is in the business of providing hair removal services with Intense Pulsed Light (IPL) devices and laser equipment. The laser hair removal services ("the services") are provided to customers at locations within New York City. The IPL devices and laser equipment used in providing the services are FDA approved and are subject to the reporting requirements under the Code of Federal Regulations, Title 21, Parts 800 to 898 for Medical Devices. The equipment may be purchased or leased by Company. Company may lease the equipment directly from a leasing company or, in some cases, may lease the equipment from physicians who, in turn, lease the equipment directly from a leasing company. Each Company clinic has a physician who serves as a medical director. These same physicians supervise Company technicians who operate the IPL devices and laser equipment in treatment rooms that are located within their offices. Petitioner states that the physicians are compensated for these services through a contract for services, which compensation is reported to the Internal Revenue Service on Form 1099, and that the physicians are not Company's employees.

Company technicians undergo a thorough training program before performing the services. The training protocols were developed by physicians and the trainer who certifies the technicians is a registered nurse. Additional training is provided, as needed, by Company's medical directors. Petitioner represents that the technicians who perform these services are not licensed, and are not required to be licensed, under Title VIII of the Education Law.

Customers are billed directly by Company for the hair removal services provided.

Applicable law and regulations

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from the sales, except for resale, of certain enumerated services.

Section 1212-A of the Tax Law provides, in part:

Certain taxes of cities of one million or more administered by commissioner of taxation and finance (a) Any city in this state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city:

* * *

(2) a tax . . . on the receipts from every sale of the following services: beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services . . . but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law, as amended, and excluding such services when performed on pets and other animals.

Section 11-2002 of the New York City Administrative Code provides, in part:

Imposition of sales tax. On and after July first, nineteen hundred seventy-four, there is hereby imposed within the city of New York and there shall be paid a tax upon . . . the receipts specified in the following subdivision (h) . . . :

(h) Receipts from beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna bath and similar establishments and every charge for the use of such facilities, whether or not any tangible personal property is transferred in conjunction therewith; but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law, as amended, and excluding such services when performed on pets and other animals.

Opinion

Company is in the business of providing hair removal services. The services are provided to customers at locations within New York City. Customers are billed directly by Company for the services provided.

Section 1212-A(a)(2) of the Tax Law authorizes, and section 11-2002(h) of the New York City Administrative Code imposes, a tax on the receipts from every sale of "electrolysis . . . and similar services . . . but excluding services rendered by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or a person performing similar services licensed under title VIII of the education law, . . ."

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In the present case, Company is in the business of providing hair removal services using IPL devices and laser equipment. Such services are similar to and have similar results as electrolysis services. Company uses trained technicians to operate the laser hair removal equipment. It is assumed for purposes of this Advisory Opinion that the technicians who perform these services are not licensed under Title VIII of the Education Law.

Furthermore, the services that Company provides using these technicians are not medical in nature as are the services provided by a physician, osteopath, dentist, nurse, physiotherapist, chiropractor, podiatrist, optometrist, ophthalmic dispenser or other person licensed under Title VIII of the Education Law. Rather, the services provided by Company are cosmetic in nature, as are the taxable services enumerated in section 1212-A(a)(2) of the Tax Law and section 11-2002(h) of the New York City Administrative Code. Accordingly, receipts from sales of Company's services are subject to the New York City sales tax.

Since electrolysis services are not included within the enumerated services subject to tax under section 1105(c) of the Tax Law, Company's services are not subject to New York State sales and compensating use taxes (including the ¼% rate imposed by section 1109 of the Tax Law).

DATED: January 31, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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