STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MICHAEL LOZMAN, D.D.S., P.C.** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1978 through August 31, 1985.	DECISION DTA NO. 802874

Petitioner, Michael Lozman, D.D.S., P.C., 17 Johnson Road, Box 821, Latham, New York 12110, filed an exception to the determination of the Administrative Law Judge issued on May 5, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through August 31, 1985 (File No. 802874). Petitioner appeared by its corporate president, Michael Lozman, D.D.S. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

On exception, petitioner filed a brief and the Division of Taxation filed a letter in lieu of a brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the expenses incurred for the creation of lab and study models and the development of x-ray film are subject to sales and use taxes.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are incorporated herein by this reference. To summarize these facts, during the period in issue,

petitioner, Michael Lozman, D.D.S., P.C., was a professional corporation whose president, Michael Lozman, was an orthodontist. Petitioner was paid for the orthodontic services it rendered.

On October 3, 1985 the Division of Taxation, on the basis of a field audit, issued two notices of determination and demand for payment of sales and use taxes due to petitioner which together assessed a deficiency of sales and use taxes for the period December 1, 1978 through August 31, 1985 in theamount of $15,461.00 plus interest of $4,227.00 for a total amount due of $19,688.00.

In the course of the field audit which led to the foregoing assessment, the Division examined petitioner's supply and lab fee invoices for the years 1982 through 1984. As a result of this examination, the Division concluded that sales and use taxes were due in three areas wherein petitioner incurred expenses: study and lab models, x-rays and orthodontic appliances.

The Division did not request an opportunity to examine petitioner's invoices for the period December 1, 1978 through November 30, 1981 or for the sales and use tax periods ending February 28, 1985 through August 31, 1985.[1] In order to calculate the sales and use taxes due for these periods, the Division utilized the amounts shown as lab fees on petitioner's U.S. Corporation Income Tax Return multiplied by the ratio of lab fee expenses which the Division found subject to tax during the years 1982 through 1984 to total lab fee expenses during those years.

The purpose of orthodontic treatment is to alleviate a physical incapacity. Orthodontia deals with aberrations of the teeth, jaws and orofacial soft tissues. An orthodontic study model is a plaster replica of a patient's mouth. It is a diagnostic record from which an orthodontist

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[1]For the quarter ending February 28, 1982, tax was assessed on an estimated amount of purchases made during December 1981 and on actual purchases made in January and February 1982. For the quarter ending February 28, 1985, tax was computed based on actual purchases of $4,711.00 for December 1984 and estimated purchases for January and February 1985.

establishes a treatment plan. The models are also used to fabricate the appliances which will be used by the patient.

In order to create such a study model, impression material is mixed to a batter-like consistency and inserted into a tray. The tray, containing the impression material, is then placed into the patient's mouth and left until set. When set, the impression is removed from the patient's mouth and sent to a laboratory which uses the impression as a negative mold of the patient's mouth (tr, p. 104), to create a plaster duplicate of the patient's mouth.

An orthodontist places x-ray film purchased by him into a patient's mouth where it is either held against the teeth or placed alongside the patient's head. The film is then exposed by use of an x-ray machine. The exposed film is then sent to the laboratory for developing.

There are various types of x-rays. The standard x-ray shows roots and crowns as well as the development of infant and permanent teeth. Another type of x-ray shows the structure of the entire skull, and a third type presents a panoramic view of all of a patient's teeth on the same film. X-rays are also diagnostic records which provide insight into a patient's disability and treatment program.

OPINION

The Administrative Law Judge held that: (1) the Division's failure to request petitioner's books and records prior to resorting to the use of external indices was grounds to cancel the tax assessed for the months December 1978 through December 1981, and for the periods ending February 28, 1985 through August 31, 1985, except for tax assessed on $4,711.00 of actual purchases for December 1984, (2) expenses incurred for petitioner's purchases of laboratory and study models were subject to tax under section 1105(a) as a retail purchase of tangible personal property, (3) the purchase of x-ray film processing services was subject to sales tax under section 1105(c)(2) of the Tax Law, and (4) the Division was under no duty to alert petitioner that tax was due for these items.

On exception, petitioner asserts that: (1) its models and x-ray film are diagnostic records,

not "supplies" as that term is used within Tax Law section 1115(a)(3), and as such are an extension of the patient forming an integral and inseparable component part of the non-taxable service of dental treatment, or (2) in the alternative, that its x-ray film and study models, as diagnostic records, are exempt from tax as "artificial devices" within the meaning of Tax Law section 1115(a)(4), and (3) that the sales tax assessment for the models is improper because the laboratory allegedly never owned them and thus lacked the capacity to transact their sale.

We affirm the determination of the Administrative Law Judge.

The study models are our first concern. Tax Law section 1105(a) imposes a sales tax on "every retail sale of tangible personal property, except as otherwise provided in [Article 28]". A "retail sale" is "a sale of tangible personal property to any person for any purpose . . ." with certain exclusions not applicable here (Tax Law § 1101[b][4][i]). A "sale," in turn, means in part "any transfer of title or possession or both, . . . in any manner or by any means whatsoever for a consideration" (Tax Law § 1110[b][5]; 20 NYCRR 526.7[a][1]). Here possession, if not also title, of the models, which the laboratory produced using petitioner's negative molds as a guide, was transferred to petitioner in return for petitioner's payment for them.

Petitioner argues that the laboratory did not have ownership of the models and therefore it could not sell them to petitioner. This claim is inconsistent with the record which indicates that the study models were made with materials provided by the laboratory using petitioner's negative mold impressions to shape the positive plaster products at issue. In any event, such ownership is not necessary as a condition precedent for a sale since "transactions involving passage of title or (emphasis supplied) actual exclusive possession[2] constitute sales" within the meaning of Tax Law section 1101(b)(5) (Matter of Darien Lake Fun Country, Inc. v. State Tax Commn., 118 AD2d 945, affd 68 NY2d 630; Matter of Shanty Hollow Corp. v. State Tax Commn., 111 AD2d

[2]The Court of Appeals has suggested that a sale might be found even without "a physical change of possession. However, in light of the decisional elaboration (in part, the later two of the four above cited cases immediately following), any change should be effected legislatively" (Hospital Television Systems, Inc. v. State Tax Commn., 36 NY2d 746, 747).

968, 969; Bathrick Enterprises v. Murphy, 27 AD2d 215, 216; American Locker Co. v. City of New York, 308 NY 264, 267 [involving a similar New York City tax]). Having fulfilled the requirements of a retail sale, unless otherwise excluded or exempted, this purchase by petitioner would be subject to sales tax.

Petitioner's claim that the study models, when used as part of dental treatment, must be free of any sales tax is misdirected because it does not address the point that the taxable transaction at issue is that between the laboratory and petitioner and not petitioner and its patients. As pointed out by the Administrative Law Judge, there is no dispute that petitioner's orthodontic services are non-taxable and that the models are diagnostic tools used by Dr. Lozman in his practice as an orthodontist. Petitioner's insistence that use of the models in orthodontic care necessarily shields them from tax is an argument which fails to account for the nature of the sales tax as a "transactions tax" (20 NYCRR 525.2[a][2]) and ignores the transaction between the laboratory and petitioner.

Nor do we find persuasive petitioner's argument, that its diagnostic tools are excluded from tax owing to their incorporation into non-taxable orthodontic care. Petitioner's argument overlooks the clear language of Tax Law section 1115(a)(3) which subjects medical equipment and supplies "purchased at retail for use in performing medical and similar services for compensation" to sales tax.[3] Our conclusion is further supported by the view advanced in Matter of John D. Butler Co. v. State Tax Commn. (131 AD2d 953, 954) that dental products, which are "part and parcel of the professional services dentists render (when) their cost is an inherent component of and embodied within the general fee charged by the dentist for his services," become subject to sales tax when purchased at retail by the dentist prior to their use in dental care.

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[3]Petitioner has argued that the study models are not supplies within the meaning of Tax Law § 1115(a)(3) and thus has not attempted to fall within this exemption. Nonetheless, we conclude this effect would result if we were to adopt petitioner's position.

Petitioner's allegation that the Division's assessment here is a burdensome pyramiding of tax also lacks merit. Pyramiding would occur if the study models were taxed both at the time petitioner purchased them and again later as part of dental services made subject to sales tax. Since petitioner's orthodontic services are not subject to tax, petitioner's pyramiding argument is inapplicable (see, Matter of Shanty Hollow Corp. v. State Tax Commn., 111 AD2d 968, 969).

We conclude that the exemption provided by Tax Law section 1115(a)(4) for certain "prosthetic aids, hearing aids, eyeglasses and artificial devices" also does not apply. Statutes creating a tax exemption are to be strictly and narrowly construed (Matter of Mobil Oil Corp. v. Finance Administrator, 58 NY2d 95, 98; Matter of Grace v. State Tax Commn., 37 NY2d 193, 195). The taxpayer is burdened with proving his entitlement to an exemption (Matter of Young v. Bragalini, 3 NY2d 602, 605; Dental Society of the State of New York v. State Tax Commn., 110 AD2d 988, 989).

Petitioner argues first that the models are "artificial devices" within the meaning of Tax Law section 1115(a)(4) and then asserts that the qualification drafted by the Department of Taxation requiring "a prosthetic aid, a hearing aid, eyeglasses or an artificial device . . . (to) completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part" (20 NYCRR 528.5[b]) is an overlybroad interpretation of the statute to the extent that it applies to artificial devices. Under our authority to rule on the validity of the regulations of the commissioner of taxation and finance where such regulations are at issue (Tax Law § 2006.7; 20 NYCRR 3000.11[e][3]), we find the regulation to be a valid interpretation of Tax Law section 1115(a)(4).

Generally, artificial devices must be "purchased to correct or alleviate physical incapacity in human beings" to qualify for the exemption (Tax Law § 1115[a][4]). Petitioner asserts that these models were purchased to correct or alleviate the physical incapacity of its patients' mouths and teeth and thus fall within the exemption. As for the qualification set forth in 20 NYCRR 528.5(b)(1) that the artificial device replace a body part or function, petitioner argues that the

phrase "artificial devices" has a unique and separate meaning from prosthetic aids, hearing aids and eyeglasses, one which cannot be subject to this limitation. Specifically, petitioner asserts that the models, as artificial devices, meet a plain reading of the statute and that the limitation of 20 NYCRR 528.5(b)(1) is, in effect, outside the legislative intent of Tax Law section 1115(a)(4).

"A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes, { 97). The legislative history does not further clarify the phrase "artificial devices" (Bill Jackets, 1965, ch 93; 1976, ch 201). We note that prosthetic aids, hearing aids and eyeglasses clearly replace a missing body part or the function of a permanently malfunctioning body part and that 20 NYCRR 528.5(b) has been specifically applied as a valid interpretation of "prosthetic devices" within Tax Law section 1115(a)(4) (Dental Society of the State of New York v. State Tax Commn., 110 AD2d 988, 990).

"Artificial device" means a humanly contrived object - fanciful, elaborate, or intricate in design - often on a natural model: such as an artificial limb (Webster's New Collegiate Dictionary 106, 347 [9th ed 1987]). This definition, however, is only useful to the extent that the whole and every part of Tax Law section 1115(a)(4) is considered (McKinney's Cons Laws of NY, Book 1, Statutes, { 98[a]; Miriam Kostika v. Mario Cuomo, 50 AD2d 742, 743; Matter of Frank Manieri v. Wagner, 33 Misc2d 163, 164) together, each part in reference to each other (People v. Mobil Oil Corp., 48 NY2d 192, 199; Matter of Izzo v. Kirby, 56 Misc2d 131, 135) in determining the meaning of "artificial devices."

We conclude, when interpreting "artificial devices" by assessing Tax Law section 1115(a)(4) as a whole, that the Legislature employed the phrase "artificial devices" following the terms "prosthetic aids, hearing aids and eyeglasses" to include only those artificial devices which, like prosthetic aids, etc., replace actual body parts or their functions. We find that the terms preceding "artificial devices" within the paragraph (Tax Law § 1115[a][4]) were meant to serve as examples limiting the type of "artificial devices" qualifying for the exemption. Thus, the

qualifications of 20 NYCRR 528.5(b)(1) correctly reflect the legislative intent concerning "artificial devices." Petitioner has not met his burden to convince us to the contrary that models used simply for diagnostic purposes fulfill these qualifications (20 NYCRR 3000.10[d][4]).

Finally, petitioner argues that the creation of the study models is exempt from tax by Tax Law section 1115(g). The requirements of this exemption are that the service in question would otherwise be taxable under Tax Law section 1105(c)(3) and that the service be performed upon, inter alia, "artificial devices" within the meaning of Tax Law section 1115(a)(4). Petitioner has failed to satisfy these requirements. The laboratory's transfer, not maintenance or servicing, of the models is at issue. Thus, Tax Law section 1105(c)(3) is inapplicable. Finally, for the reasons already mentioned, the study models are not "artificial devices."

We next turn to the x-ray film. Tax Law section 1105(c)(2) imposes a tax on the service of "processing . . . tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed." Petitioner has not excepted to the Administrative Law Judge's determination that Tax Law section 1105(c)(2) characterizes the film's development as a taxable service. Instead, as already discussed with respect to the study models, petitioner regards the x-rays as an extension of the patient and thus, as part and parcel of the non-taxable service of orthodontic care, exempt from sales tax. For the same reasons stated with regard to the study models, we find no merit to this argument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Michael Lozman, D.D.S., P.C., is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Michael Lozman, D.D.S., P.C. is granted to the extent indicated in conclusions of law "B", "J" and "K" of the Administrative Law Judge's determination and the Division of Taxation is directed to modify the notices of determination issued on October 3, 1985 accordingly, but except as so granted the petition is in all other respects denied.

DATED: Albany, New York
February 9, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner