

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>ARROW INTERNATIONAL, INC.</b>	:	DECISION
	:	DTA NO. 818934
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 1996 through August 31, 1999.	:	

---

Petitioner Arrow International, Inc., P.O. Box 12888, 2400 Bernville Road, Reading, Pennsylvania, 19612-2888, filed an exception to the determination of the Administrative Law Judge issued September 25, 2003. Petitioner appeared by Stevens & Lee, PC (Richard S. Caputo, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia E. McDonough, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

***ISSUE***

Whether the Division of Taxation properly asserted compensating use tax on petitioner's distribution of intra-aortic balloon pumps and catheters used by health care providers in the diagnosis and treatment of coronary diseases.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 19, 2000, following an audit, the Division of Taxation ("Division") issued to petitioner, Arrow International, Inc., two notices of determination. Notice L-018052629 asserted \$34,518.02 in additional sales and use taxes due, plus interest, for the period September 1, 1996 through August 31, 1999. Notice L-018052630 asserted \$47,868.55 in additional sales and use taxes due, plus interest, also for the period September 1, 1996 through August 31, 1999.

Petitioner is in the business of manufacturing and selling medical equipment. Among the products petitioner manufactures and sells are intra-aortic balloon pumps and catheters used by health care providers in the diagnosis and treatment of coronary diseases. Petitioner's business is located in Reading, Pennsylvania. It has no physical locations in New York. It does have six sales representatives in New York and regularly makes sales to New York hospitals.

The two statutory notices, which assess a total tax due of \$82,386.57, plus interest, consist of tax as determined on audit by the Division in three areas: 1) \$73,520.48 in use tax due on catheters and balloon pumps given as samples by petitioner to hospitals located in New York; 2) \$7,139.86 in use tax due on printed promotional materials distributed by petitioner's sales representatives in New York; and 3) \$1,726.23 in delinquent sales tax returns for the quarters ended May 31, 1999 and August 31, 1999.

Of the total use tax asserted due on catheters and pumps, \$24,750.00 is for sample pumps distributed to hospitals. Petitioner shipped such pumps at no charge to selected hospital customers as an incentive for such customers to purchase balloons and catheters from petitioner.

Petitioner retained title to the pumps, which cost approximately \$10,000.00 each. Petitioner listed the cost of such pumps in a capital account and fully depreciated such costs on its books.

Of the use tax asserted due on catheters distributed as samples, \$38,663.08 results from catheter samples distributed by petitioner's sales representatives to hospitals in New York, \$9,768.02 results from catheter samples shipped by common carrier to hospitals in New York, and \$339.38 results from samples sent to New York hospitals through the mail. Petitioner distributed the catheters as samples to promote the sale of petitioner's products. Petitioner's name is printed on the catheters at issue.

Petitioner did not contest the Division's assertion of tax due on printed promotional materials. Indeed, it appears from the audit report that this portion of the assessment was based on calculations submitted by petitioner.

With respect to the tax asserted due with respect to delinquent sales tax returns for the quarters ended May 31, 1999 and August 31, 1999, petitioner asserts that it is not liable for these amounts based on its position that it is not liable for use tax on the subject balloon pumps and catheters.

Petitioner does not take issue with the Division's audit method or computation of tax due, has paid both of the assessments in full to stop the accrual of interest and now claims a refund of the amounts paid.

Certain of the hospitals that were petitioner's customers receiving sample pumps and catheters are exempt organizations under Tax Law §1116(a).

While petitioner asserts in its brief to the Administrative Law Judge that certain of the catheters at issue were replacements for defective catheters, there is no evidence in the record to support this assertion.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that the Tax Law imposes “on every person a use tax for the use within this state” of “any tangible personal property . . . manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business” (Tax Law § 1110[a][B][i]). The term “use” is defined, in relevant part, as:

*The exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property . . . . Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials . . .* (emphasis added) (Tax Law § 1101[b][7]).

“Promotional materials” are, in turn, defined as:

Any advertising literature, other related tangible personal property (whether or not personalized by the recipient’s name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like (Tax Law § 1101[b][12]).

The Administrative Law Judge found that petitioner’s distribution of the pumps and catheters at issue was properly subject to compensating use tax. Petitioner distributed the pumps and catheters at issue free of charge to hospitals in New York as an inducement to those hospitals to make additional purchases of petitioner’s products. Thus, the Administrative Law Judge found that the catheters and pumps fall within the definition of “promotional materials” under Tax Law § 1101(b)(12) and the distribution of such promotional materials in New York

was a use by petitioner of the subject equipment pursuant to Tax Law §1101(b)(7).<sup>1</sup> Since petitioner is in the business of manufacturing and selling the subject pumps and catheters, the Administrative Law Judge found that such use is subject to compensating use under Tax Law § 1110(a)(B)(i). Additionally, with respect to the pumps, the Administrative Law Judge found that petitioner's transfer of these items into a capital account and subsequent depreciation of that equipment indicates that such equipment became assets used by petitioner in its business (*see, Matter of Datascope Corp.*, Tax Appeals Tribunal, August 6, 1992, *confirmed Matter of Datascope Corp. v. Tax Appeals Tribunal*, 196 AD2d 35, 608 NYS2d 562).

Petitioner argued that Tax Law § 1115(a)(3) exempts the pumps and catheters at issue from use tax. That provision exempts from sales and use tax receipts from medical equipment and supplies, except for medical equipment and supplies "purchased at retail for use in performing medical and similar services for compensation" (Tax Law § 1115[a][3]). Petitioner urged that since the equipment at issue was not purchased at retail the exception to the exemption was not triggered and, therefore, the exemption must apply.

The Administrative Law Judge rejected this argument. The Administrative Law Judge pointed out that it is petitioner's use of the pumps and catheters in New York which is subject to use tax herein. Such use consisted of petitioner's distribution of the equipment in New York for the purpose of promoting its business. Thus, the Administrative Law Judge noted, the taxable event was petitioner's use in New York of the equipment as promotional materials and not as medical equipment as such. Further, the Administrative Law Judge stated, had the subject

---

<sup>1</sup> Even if the pumps and catheters were not considered promotional materials under Tax Law § 1101(b)(12), such equipment is unquestionably tangible personal property and was unquestionably distributed by petitioner in New York. Such distribution is a use by petitioner of the subject equipment pursuant to Tax Law § 1101(b)(7).

equipment been sold to petitioner's hospital customers, such sale would not have been exempt under Tax Law § 1115(a)(3), because such sale would have been a retail sale of medical equipment for use in performing medical services for compensation and the exception to the exemption would have been triggered. Since the purpose of the use tax is to complement the sales tax (*see, Matter of Datascope Corp. v. Tax Appeals Tribunal, supra*), it would be inconsistent with that purpose to find that the distribution of the subject equipment to hospital customers is exempt from use tax under Tax Law § 1115(a)(3), while the sale of the same equipment to the same customers is expressly not exempt from sales tax under the same provision.

The Administrative Law Judge also rejected petitioner's contention that certain of the subject pumps and catheters are exempt from use tax because such pumps and catheters were distributed to hospital customers of petitioner which are exempt organizations under Tax Law § 1116(a). The Administrative Law Judge pointed out that Tax Law § 1116(a) exempts from sales and compensating use taxes "any sale" by or to any of the exempt organizations listed therein. In the instant matter, petitioner distributed tangible personal property without cost to its customers to promote its business. Petitioner did not *sell* any of the equipment at issue. The Administrative Law Judge found that since none of the equipment was sold, the exempt organization provisions of Tax Law § 1116(a) do not apply.

Petitioner also asserted that the pumps and catheters are exempt from use tax as promotional materials pursuant to Tax Law § 1115(n)(4) which provides, in relevant part, as follows:

[p]romotional materials which are printed materials and promotional materials upon which services described in [Tax Law § 1105(c)(2)] have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or

causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service (Tax Law § 1115[n][4]).

The Administrative Law Judge noted that this exemption applies where the purchaser of promotional materials mails or ships such materials to customers or prospective customers.

However, the Administrative Law Judge found that petitioner did not purchase the pumps and catheters, but rather, petitioner manufactured this equipment and distributed it, sometimes by shipping, to its New York customers. Since petitioner was not a purchaser of the equipment at issue, the Administrative Law Judge found that the exemption under Tax Law § 1115(n)(4) did not apply, and he denied the petition.

#### ***ARGUMENTS ON EXCEPTION***

Petitioner filed no brief in support of its exception. The Division of Taxation makes the same arguments as were raised below.

#### ***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons stated therein. There is no basis in this record that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Arrow International, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Arrow International, Inc. is denied; and

4. The notices of determination (Notice L-018052629 and Notice L-018052630) dated June 19, 2000 are sustained.

DATED: Troy, New York  
June 17, 2004

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner