

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CUPID DIAPER SERVICE CORPORATION : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 817557
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 1991 through February 28, 1995. :

Petitioner, Cupid Diaper Service Corporation, 129-09 Jamaica Avenue, Richmond Hill, New York 11418, filed a 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 June 1, 1991 through February 28, 1995.

On October 2, 2000 and October 6, 2000, respectively, petitioner by its CFO, Donald R. Deitrich, CPA, and the Division of Taxation by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by March 14, 2001, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's sales of adult disposable diapers are subject to sales tax.

FINDINGS OF FACT

The findings of fact herein are based upon a stipulation of fact entered into by the parties and dated November 1 and 2, 2000.

1. Cupid Diaper Service Corporation (“Cupid”) purchases and sells adult disposable diapers and operates an adult cloth diaper laundry service.
2. The Division of Taxation (“Division”) conducted a detailed sales tax field audit of petitioner’s purchases and sales records for the period June 1, 1991 through February 28, 1995. The Division concluded that petitioner’s books and records were adequate for this purpose. On August 3, 1998, the Division issued to petitioner a Notice of Determination (Notice Number L-015436699) assessing sales tax due of \$122,698.20 on petitioner’s sales of disposable diapers, use tax due of \$105,491.66 on petitioner’s purchases of cloth diapers, and penalties for the period at issue. The total amount of sales and use tax assessed is \$228,189.87.
3. Petitioner’s treasurer or its duly authorized representative at the time executed 12 consents which extended the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1991 through August 31, 1995 to September 20, 1998.
4. During the audit period, petitioner sold adult disposable diapers, which constitute tangible personal property for purposes of Articles 28 and 29 of the Tax Law, to nursing homes, adult homes, doctors and medical supply dealers.
5. The adult disposable diapers are designed so that a user can put them on and remove them without assistance. Petitioner has no knowledge of the physical or medical conditions of the individuals who wear the diapers.
6. Cupid does not perform any medical or similar services.
7. Some of the entities that purchased petitioner’s disposable diapers are exempt organizations pursuant to Tax Law § 1116; however, during the audit period, petitioner sold disposable diapers to the following ten for-profit entities (including, among others, nursing

homes, adult homes or doctors) that are not exempt organizations under Tax Law § 1116: Cloves Lake Nursing Home, Franklin Nursing Home, Friedwald House Nursing Home, Parkview Nursing Home, A & O Surgical, Clearview Nursing Home, Garden City Health Care, Doctor Norman Last, Tower Air, Inc. and Seacrest Health Care. Sales to such organizations and individual during the audit period totaled \$1,487,250.88. Petitioner did not collect sales tax on such sales.

8. The Division has not issued a specific exemption certificate that pertains only to sales of medical equipment and supplies. Petitioner did not receive an Exempt Use Certificate (Form ST-121) or other representation from any of the for-profit entities referred to in Finding of Fact “7” to indicate that they were exempt from sales tax as an entity or that the transactions in question were exempt from sales tax. Petitioner has no knowledge as to how the adult disposable diapers were used, i.e., whether or not they were used by its customers in a taxable manner. Petitioner has no knowledge of the filing of sales and use tax returns by the entities referred to in Finding of Fact “7”.

9. Medical supply dealers purchased the disposable diapers from petitioner for resale and properly completed resale certificates were on file for all of petitioner’s sales to such dealers. Therefore, sales to medical supply dealers are not at issue in this matter.

10. Petitioner purchases cloth diapers and uses them in its laundry service. The diapers are reusable; title to the diapers remains with Cupid.

11. As a result of the audit, use tax was assessed on Cupid’s purchases of cloth diapers because the audit revealed that petitioner had issued resale certificates to its suppliers and had not paid use tax on its purchases of the cloth diapers.

12. Following the Bureau of Conciliation and Mediation Services (BCMS) conference held on September 9, 1999, a conciliation order was issued, dated December 10, 1999, which canceled that portion of the assessment relating to use tax on petitioner's purchases of cloth diapers (\$105,491.66), reduced that portion of the assessment relating to sales tax on disposable diapers to \$61,759.14, and abated all penalties. The conferee's reduction in the sales tax assessed on petitioner's sales of disposable diapers from \$122,698.20 to \$61,759.14 was based on the allowance of an overlapping audit adjustment for petitioner's sales to Cloves Lake Nursing Home. Petitioner had sales of disposable diapers totaling \$738,655.23 to Cloves Lake Nursing Home during the audit period.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article.” All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) “until the contrary is established.” Although not specifically articulated, it appears that petitioner is claiming that its sales of disposable diapers are exempt from sales tax as medical supplies under Tax Law § 1115(a)(3). Where a taxpayer claims an exemption from tax, the burden is on the taxpayer to show that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable (*Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027).

B. Pursuant to Tax Law § 1132(c)(1), petitioner bears the burden of proving by clear and convincing evidence that the tax assessed was erroneous (*Matter of Rizzo v. Tax Appeals Tribunal*, 210 AD2d 748, 621 NYS 2d 115; *Matter of Mobley v. Tax Appeals Tribunal*, 177 AD2d 797, 799, 576 NYS 2d 412, *appeal dismissed* 79 NY2d 978, 583 NYS2d 195; *Matter of*

Surface Line Operators Fraternal Line Organization v. Tully, 85 AD2d 858, 446 NYS2d 451).

Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (*see, Matter of Suburban Carting Corporation*, Tax Appeals Tribunal, May 7, 1998, citing *Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed* 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). Petitioner has not presented any evidence to establish that the sales of the disposable diapers are exempt from the imposition of sales tax. The unsubstantiated allegations in the petition are insufficient to overcome the presumption of taxability (*see, Matter of Vebol Edibles, Inc., v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS2d 643).

C. Section 1115(a)(3) of the Tax Law provides an exemption from sales tax for:

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 medical ingredients therein or medical equipment (including components parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

The sales and use tax regulations defines the term “medical services” as including but not limited to “the practices of medicine, dentistry, physical therapy, chiropractic, nursing, podiatry, optometry and radiology, whether performed by a private practitioner, clinical laboratory, hospital, nursing home, ambulance service, clinic or health maintenance facilities” (20 NYCRR 528.4[h][2]).

In the present matter, petitioner is selling disposable diapers to various for-profit entities. It is apparent that the nursing homes and other entities provide medical services as that term is defined in section 528.4(h)(2) of the regulations. As Cupid's customers are purchasing the disposable diapers at retail in the performance of medical and similar services for compensation, the supplies purchased by the customers for use in performing these services are not exempt from sales tax (Tax Law § 1105[a]; § 1115[a][3]; *Matter of University Medical Imaging, P.C.*, Tax Appeals Tribunal, December 7, 2000).

D. In its petition, Cupid alleges that it is entitled to an adjustment due to the Division's overlapping audit policy. It is noted that, following the BCMS conference, the assessment was adjusted to account for sales tax paid by Cupid's customers on audit. Petitioner has failed to prove entitlement to any additional adjustment (*Matter of Allied Aviation Service Co. of N.Y., Inc.*, Tax Appeals Tribunal, June 27, 1991).

E. The petition of Cupid Diaper Service Corporation is denied and the Notice of Determination dated August 3, 1998, as modified (*see*, Finding of Fact "12"), is sustained.

DATED: Troy, New York
August 23, 2001

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE