

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LOWE’S HOME CENTERS, INC.** : DETERMINATION  
 : DTA NO. 819043  
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, 1995 through August 31, 1998. :

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Petitioner, Lowe’s Home Centers, Inc., Highway 268 East, North Wilkesboro, North Carolina 28656, 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 December 1, 1995 through August 31, 1998.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York, on April 3, 2003 at 9:15 A.M., with all briefs to be submitted by September 26, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Phillips, Lytle, Hitchcock, Blaine & Huber LLP (Edward M. Griffith, Jr. and Gary J. Gleba, Esqs., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia E. McDonough, Esq., of counsel).

***ISSUES***

I. Whether the purchase of pipe cutting and threading machines, glass cutting machines, vertical panel and cross-cut saws, wire measuring and coiling equipment, carpet cutting

equipment, cardboard balers and window trim cut-down machines by petitioner are exempt from sales tax pursuant to Tax Law § 1115(a)(12).

II. Whether electric shopping carts purchased by petitioner and utilized by petitioner's customers in its stores are exempt from sales tax pursuant to Tax Law § 1115(a)(3).

### ***FINDINGS OF FACT***

Along with its brief, petitioner submitted 12 proposed Findings of Fact each of which has been substantially incorporated into the following Findings of Fact except for portions of proposed Findings of Fact "2" and "3" (relating to manufacturing or processing) which are conclusory in nature and that portion of proposed Finding of Fact "11" which states "Lowe's makes the carts available to *handicapped* individuals . . ." since such statement is not supported by the record herein.

1. Lowe's Home Centers, Inc. ("Lowe's") is a "big box" national retailer of home improvement products. At the beginning of the audit period, Lowe's operated one store in the State of New York; by the end of the audit period, it had seven stores in New York. Lowe's sells finished products and, in addition, has machinery on site at its stores which can alter stock product to customers' exact specifications. Approximately 90 percent of Lowe's business consists of sales to "do-it-yourselfers" with the remainder of its sales to contractors and exempt entities.

2. Lowe's sells windows (under the brand name "Reliabil") which it manufactures at two stand-alone facilities located in Tennessee and North Carolina. The remainder of its sales are of stock product purchased from third-party manufacturers. Lowe's does provide services by means of certain machinery and equipment in its stores which can alter some of its stock product to its customers' specifications. These machines include: pipe cutting and threading machines;

glass cutting machines; vertical panel and cross-cut saws; wire measuring and coiling equipment; carpet and floor covering cutting machines; cardboard balers; and window trim cut-down machines.

3. Pipe threading machines look and operate in a manner similar to an industrial lathe in a machine shop. The machine has a hole in its center through which pipe stock is fed and measured. At the other end is a cutting chuck that can be rolled around the pipe to shear off the desired length. A threading chuck is then used to thread the pipe if so desired by the customer.

4. Glass cutting machines consist of a structural steel workbench, measuring device, straightedge and cutting scribe. The machine is used to cut glass by placing a pane of glass on the workbench and scribing the glass with a special cutter. The waste product resulting from cutting the glass panes is not purchased by Lowe's customers, but is a by-product of the process.

5. Vertical panel and cross-cut saws are large steel platforms equipped with a cross-cut power saw that can be maneuvered to cut or rip structural lumber, timber and large sheets of plywood. The saw includes a dust collection system and is chained off from the main store floor.

6. Wire cutting and coiling machines are used to measure, wind and cut electrical wire and cables, chains, ropes and other similar items which are purchased by Lowe's on large 500-foot spools. Some of the machines have an electrical cutting mechanism while others are hand-operated.

7. Carpet cutting machines are large structural steel towers with cutting units that are used to load, hold and cut 400-foot rolls of carpet and vinyl flooring. The machines include an electro-mechanical roller system to move the rolls into a cutting position, a measuring device and a cutting unit to slice the carpet or vinyl flooring.

Lowe's sells carpeting and vinyl floor covering on both an installed and uninstalled basis. When a customer enters into a contract with Lowe's for installation of carpeting or vinyl floor covering, Lowe's subcontracts out these installation services to a subcontractor who is not an employee of Lowe's.

8. Vertical balers are heavy steel electro-mechanical compactors that compress old corrugated cardboard ("OCC") boxes into recyclable OCC bales which weigh up to 900 pounds. The cardboard originates from various vendors which package their products in cardboard and from cardboard boxes from Lowe's distribution centers. The bales are then twist-tied with bands of steel and are moved by forklift to the outside of Lowe's stores where they are picked up for recycling. Lowe's trash hauler, Waste Integrated Services Corporation (WISC") arranges for the sale of the OCC bales on behalf of Lowe's to third-party recyclers. The recyclers pay WISC directly for the OCC bales. Lowe's reports the payments from the recyclers to WISC as "recycling income" on its books. WISC offsets the amount of the income it receives for the OCC bales as a credit to Lowe's against WISC's monthly service invoices.

9. Window trim cut-down machines are used to shear and shape stock plantation shutters and mini-blinds. The machines are several feet in length and include a device for measuring the materials to a customer's window specifications and a precision cutting device used to cut the length and round the corners of the multiple slats of wood or plastic that comprise the stock product.

10. Lowe's purchases electric "Mart Carts." The carts are placed just inside the entrance to each store. The carts have solid 8-inch diameter rubber tires and have a large shopping basket attached to the front of each cart. The manufacturer's brochure describing the Mart Cart notes

that 2 out of 10 Americans have functional limitation, that 25.2 million Americans cannot walk 3 city blocks and that 23.7 million Americans lack the energy to lift a 10-pound bag of groceries.

Lowe's does not inquire into a customer's need to use a Mart Cart; it places no restrictions on their use to those who are disabled or in need as a result of a medical condition. No medical certification or prescription is needed to utilize a Mart Cart.

The Mart Cart web page notes that the carts enable a retailer to target and accommodate the needs of today's older shoppers.

11. The Division of Taxation's auditor visited Lowe's Utica, New York store for the purpose of examining the Mart Carts. She was told by a store representative that the Mart Carts were for the convenience of the customers who were not required to be handicapped in order to use them. In order to use a Mart Cart, it was not necessary to ask for the key which was already in the cart.

12. On July 13, 1999, the Division of Taxation ("Division") received a petition for an Advisory Opinion from Lowe's which raised the issue of whether certain types of equipment are used directly and predominantly in the production of tangible personal property for sale and are, therefore, exempt from sales and use tax under Tax Law § 1115(a)(12) of the Tax Law. In the petition for the Advisory Opinion, Lowe's included four types of equipment for which the exemption from tax was sought, to wit: (1) cardboard baler/compactor; (2) panel and cross-cut saws; (3) pipe cutting/threading equipment; and (4) carpet and vinyl floor cutting equipment.

In describing the equipment for which it sought an exemption from sales tax, Lowe's, in explaining the use of the cardboard baler/compactor, stated: "This equipment is used to compact and bale scrap cardboard that is later sold to recycling companies." Attached to the petition were a picture and an invoice from the vendor of the equipment.

13. Lowe's filed a refund claim dated September 15, 2000 seeking a refund in the amount of \$135,882.91 for sales and use taxes paid on various equipment located at its New York stores for the period at issue herein.

14. On November 30, 2000, the Division issued an Advisory Opinion (TSB-A-00[51]S) which held that the equipment (*see*, Finding of Fact "12") was not exempt pursuant to Tax Law § 1115(a)(2). As to the cardboard baler/compactor, the Advisory Opinion held that it was not exempt because Lowe's was not producing tangible personal property for sale but, instead, was paying a commercial hauler to remove the crushed cardboard. As to the panel and cross cut saws, pipe cutting/threading equipment and carpet and vinyl floor cutting equipment, the Advisory Opinion also denied the exemption on the basis that the equipment was not used directly in the production of tangible personal property for sale. The Advisory Opinion held, in pertinent part, as follows:

Petitioner's materials have already left the production line and have entered into the retail distribution chain which cannot be construed to be a continuation of the production process. The materials may already be on display for sale. Thus, the equipment and tools used to size, cut or thread the materials to customers' specifications do not meet the requirement for the production exemption.

As previously noted, the Advisory Opinion did not specifically address Lowe's glass cutting machines, window trim cut-down machines or wire measuring and coiling equipment.

15. Based upon the Advisory Opinion, the Division denied Lowe's refund claim in full. Lowe's thereupon filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On March 8, 2002, BCMS issued a Conciliation Order (CMS No.188403) which granted a refund in the amount of \$24,983.69, plus applicable interest. On June 6, 2000, the Division of Tax Appeals received a petition seeking administrative review; the amount of refund sought in the petition was \$40,232.03.

16. At the hearing held in this matter, the parties stipulated that the amount remaining at issue, i.e., the total amount of the refund sought by Lowe's is \$25,886.45 which consists of tax paid by Lowe's on the following equipment:

<b>TYPE OF EQUIPMENT</b>	<b>AMOUNT OF TAX</b>
Mart Carts	\$1,650.69
Pipe Cutting & Threading Machines	\$1,300.32
Glass Cutting Machines	\$418.71
Vertical Panel & Cross Cut Saws	\$1,266.87
Wire Measuring & Coiling Equipment	\$150.01
Carpet & Floor Covering Cutting Machines	\$19,516.46
Cardboard Balers	\$1,406.75
Window Trim Cutdown Machines	\$176.64
<b>TOTAL</b>	<b>\$25,886.45</b>

17. The various pieces of equipment which are the subject of this claim for refund are located inside Lowe's stores. With the exception of the vertical balers which compress cardboard (these are located in the storage areas of the stores), each of these pieces of equipment is located in the customer display/sales floor near the specific product displays.

18. Lowe's customers may purchase the tangible personal property for sale (e.g., pipe, glass, window trimmings, wood or wire) in stock sizes or, in the alternative, may have it cut down to a specific size. Lowe's does not charge its customers an additional fee for its cutting services.

Tangible personal property such as glass or wood that is improperly cut due to Lowe's error is discarded and the cost is borne by Lowe's. It is Lowe's policy to charge the customer for the tangible personal property if it is improperly cut due to an error by the customer.

When a customer chooses to have a piece of wood (plywood or lumber) or glass cut down to his or her specifications, the customer must pay for the stock size piece prior to cutting. The customer may keep whatever is left over after the stock piece is cut or, in the alternative, Lowe's will dispose of it as waste.

19. In reviewing Lowe's refund claim and during the audit, the auditor performed "a small test of sales" and during that test did not see any invoices for installation of carpet. Lowe's Director of Sales and Use Tax, Craig J. Price, stated that for the 2002 fiscal year, Lowe's revenues were \$26.4 billion and the total revenues from its installed sales (this includes installed vinyl, carpet and kitchen cabinets) were \$1 billion. The record contains no breakdown as to what percentage of these installed sales were related to installation of carpet and vinyl flooring.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

20. Petitioner contends:

a. Lowe's cutting equipment, i.e., the pipe cutting and threading machines, glass cutting machines, vertical panel and cross-cut saws, wire measuring and coiling equipment, carpet cutting equipment, cardboard balers and window trim cut-down machines are exempt from sales tax as production machinery and equipment under Tax Law § 1115(a)(12). This is true because the cutting equipment is used directly and predominantly to get unfinished product in a form or shape which is ready to be sold to Lowe's customers.

b. The carpet cutting equipment was used predominantly to cut carpet for sale as opposed to cutting the carpet for purposes of installation.

c. The Mart Carts are designed to alleviate physical incapacity and were purchased by Lowe's for use by handicapped individuals who otherwise would be unable to walk the



long shopping aisles of its stores. One of the primary reasons that Lowe's provides these carts is to comply with the public accommodation provisions of the Americans with Disabilities Act. Accordingly, Lowe's contends that the Mart Carts are exempt from sales tax as medical equipment under Tax Law § 1115(a)(3).

d. With respect to the cardboard balers/compactors, the Division's advisory opinion states: "Petitioner is not producing tangible personal property for sale. Instead, it pays a commercial hauler to remove the crushed cardboard." Lowe's contends that these statements are erroneous since in its Petition for Advisory Opinion, Lowe's indicated that the cardboard balers/compactors were used to compact and bale scrap cardboard that is later sold to recycling companies.

21. In response, the position of the Division is as follows:

a. As to the cutting machinery at issue, the Division contends that it is not exempt because it was not used by Lowe's in the production process to produce tangible personal property for sale. Lowe's is a retailer and, with the exception of its windows manufactured under the brand name "Reliabilt," it is not a manufacturer. The tangible personal property on which the cutting machinery is used is already displayed for sale by Lowe's at its stores. Therefore, the tangible personal property has left the production phase and has entered the distribution and selling phases. It is already in marketable form.

b. As to the carpet and floor covering cutting machines, the Division states that Lowe's has failed to show that it used such machines directly and predominantly in producing tangible personal property for sale instead of using the machines to provide tangible personal property in conjunction with the sale of installation services.

c. The Mart Carts were provided to the general public as a customer service and were not provided by Lowe's primarily or customarily for medical purposes. Therefore, the Mart Carts are not exempt medical equipment pursuant to Tax Law § 1115(a)(3).

d. In its request for an advisory opinion from the Division, Lowe's merely stated that this equipment was used to crush and bale cardboard which was then disposed of by waste haulers. As a result, the Division deemed the equipment not to be exempt because it was not used to produce a product (cardboard bales) for sale. Lowe's has, therefore, failed to establish that at the time it purchased the cardboard balers/compactors, it intended to sell the cardboard bales to recyclers.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1115(a)(12), in relevant part, exempts from sales tax the receipts from the sale of:

[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment.

B. 20 NYCRR 528.13(b)(1) defines those activities which constitute "administration," "production" or "distribution," providing as follows:

(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) *Production* includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

20 NYCRR 528.13(b) also provides as follows:

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

\* \* \*

(4) Production ends when the product is ready to be sold.

20 NYCRR 528.13(c) defines the terms “directly” and “predominantly” as follows:

(1) *Directly* means the machinery or equipment must, during the production phase of a process:

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

\* \* \*

*Example 6:* Machines used to grind meat, make hamburg patties, cube steaks, or slice meat; power saws and scales when used by slaughterhouses, wholesale meat houses and supermarkets, are used directly in processing tangible personal property for sale, and are exempt.

\* \* \*

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

C. In its brief, Lowe's asserts that since one company's finished products constitute raw materials for further processing or manufacturing by another company, 20 NYCRR 528.13(b)(1)(ii), in stating that production continues "through the last step of production where the product is finished and packaged for sale," must be construed to mean that production ceases when a "stock" product is finished and packaged for final sale to a customer. Such interpretation, Lowe's contends, is consistent with Example 6 as set forth in 20 NYCRR 528.13(c)(2) which provides that machines used by supermarkets to grind or slice meat are exempt as production machinery or equipment.

The Division's position is that with the exception of its windows manufactured under the brand name "Reliabilt," Lowe's is not a manufacturer but is, instead, a retailer. Its tangible personal property, i.e., that which is the subject of this proceeding (pipe, glass, lumber and plywood, carpet and vinyl flooring and shutters and mini-blinds) has left the production phase and has entered the distribution and selling phases since, the Division maintains, it is already in marketable form. This is true, states the Division, because a customer could, if he or she wished, buy the stock-size length of pipe, piece of glass, piece of lumber or plywood, spool of wire, roll of carpet or floor covering or shutters or mini-blinds. As noted in 20 NYCRR 528.13(b)(4), "Production ends when the product is ready to be sold." What must then be determined is whether the cutting by a machine of tangible personal property to the size or shape desired by the customer is "production."

D. 20 NYCRR 531.2(b) defines the term "manufacturing" as "the production of tangible personal property that has a different identity from its ingredients. Manufacturing includes the production of standardized items as well as the production of items to a customer's specifications."

While Lowe's cutting machines do provide items which are cut to a customer's specifications, these items do not have a different identity from the stock product. However, Tax Law § 1115(a)(2) exempts machinery or equipment for use in the production of tangible personal property by *processing* as well as by manufacturing (see, *Matter of Qualex*, Tax Appeals Tribunal, February 23, 1995; *Matter of Niagara Frontier Services*, Tax Appeals Tribunal, August 9, 1990).

The term "processing" is defined in 20 NYCRR 532.1(e) as "the performance of any service on tangible personal property which effects a change in the nature, shape or form of the property." This is precisely what Lowe's cutting machines do, i.e., they change the shape of the pipe, glass, wood, wire, carpet (or floor covering) or shutters or mini-blinds to conform to the needs of Lowe's customers.

The fact that 20 NYCRR 528.13(c)(2), Example 6, provides that machines used by supermarkets to grind or slice meat are exempt from tax indicates that this exemption is not confined to machinery or equipment purchased by what the Division defines as manufacturers. While clearly, manufacturing is not the primary business of Lowe's, neither is manufacturing the primary business of a supermarket. The supermarket purchases the meat in bulk form. Although the meat is ready to be sold to the supermarket's customers, i.e., it is edible and able to be purchased by the customers, it is obviously a rare occurrence when a customer needs or desires to purchase meat in such a large quantity. The meat slicer does not change the nature of the meat but it clearly changes the form into a shape which is usable by the supermarket's customers. The same holds true for Lowe's customers. While there may be times when the stock size of pipe, wood (lumber or plywood), glass or shutters or blinds is the size desired by a particular customer, it is highly unlikely that any of Lowe's customers are desirous of purchasing

an entire 500-foot spool of wire (or cable, chain, rope, etc.) or a 400-foot roll of carpet or vinyl floor covering. That being the case, such tangible personal property is not, as the Division maintains, ready to be sold to Lowe's customers. The fact that the tangible personal property is displayed in the store, in stock size, does not mean that it has entered the distribution and selling phase. Clearly, to be in marketable form to its "do-it-yourselfers" (who make up approximately 90 percent of Lowe's customers), this tangible personal property needs to be processed, i.e., cut down to the customers' specifications to be usable by these customers.

E. As noted in Tax Law § 1115(a)(12), to qualify for the exemption from sales tax, the machinery or equipment must be for use *directly* and *predominantly* in the production of tangible personal property for sale by manufacturing, processing, etc.

With respect to each of the cutting machines or equipment, i.e., the pipe cutting and threading machines, glass cutting machines, vertical panel and cross-cut saws, wire measuring and coiling equipment, carpet and floor covering cutting equipment and window trim cut-down machines, each such machine or piece of equipment acts upon or effects a change in material to form the product which is actually sold by Lowe's to its customers (*see*, 20 NYCRR 528.13[c][1][i]). In some cases, most notably the pipe cutting and threading machines, the wire measuring and coiling equipment and the carpet and floor covering cutting equipment, the machine or piece of equipment is also used in the handling or conveyance of the product to be sold (*see*, 20 NYCRR 528.13[c][1][iii]) since the stock pipe, spools of wire and rolls of carpet or floor covering are often too large or too heavy for the typical customer to manage. Therefore, it is hereby found that Lowe's pipe cutting and threading machines, glass cutting machines, vertical panel and cross-cut saws, wire measuring and coiling equipment, carpet and floor

covering cutting machines and window trim cut-down machines were used *directly* in the production of tangible personal property for sale by Lowe's.

It must also be found that based upon the evidence presented, each of these pieces of machinery or equipment was also used *predominantly* (*see*, 20 NYCRR 528.13[c][4]) in production since each was used for the singular purpose of cutting down Lowe's stock materials to its customers' specifications.

F. With the exception of the carpet and floor covering cutting machines, there is no dispute that each of the cutting machines at issue was used more than 50 percent of the time to cut the specific piece of tangible personal property to conform to the customers' specifications. As to the carpet and floor covering cutting machines, while the record herein contains no evidence for the period at issue, it is apparent that Lowe's derives only a small portion of its revenues from sales of installed carpet and floor covering (*see*, Findings of Fact "7" and "19"). Since, by definition, machinery or equipment is used *predominantly* in production if over 50 percent of its use is directly in the production phase (*see*, 20 NYCRR 528.13[b][4]), it must be found that the carpet and floor covering cutting machines were not, as contended by the Division, used predominantly to provide tangible personal property in conjunction with the sale of an installation service. Accordingly, as was the case with Lowe's other cutting machines at issue herein, the carpet and floor covering cutting machine was used directly and predominantly in the production of tangible personal property for sale by processing and, pursuant to Tax Law § 1115(a)(12), is exempt from the imposition of sales tax when purchased by Lowe's.

G. Unlike the other cutting machines or equipment at issue herein, the Division has not contended that the exemption from tax should not apply to the cardboard balers on the basis that they were not used directly and predominantly in the production of tangible personal property by

manufacturing or processing. The exemption was denied solely because the Division asserts that the balers did not produce tangible personal property *for sale*.

The Division contends that in its request for an advisory opinion, Lowe's stated that the equipment was used to crush and bale cardboard which was subsequently disposed of by waste haulers and that Lowe's did not allege or prove that the equipment was used to produce a product (cardboard bales) for sale. As a result, the Division maintains that the Advisory Opinion (TSB-A-00[51]S) properly held that the cardboard balers were not exempt because Lowe's was not producing tangible personal property for sale.

Lowe's has correctly pointed out that in its petition for the advisory opinion, it stated that the cardboard bales were sold to recycling companies. Therefore, the Division, in its Advisory Opinion, erroneously held that the cardboard balers were not exempt because Lowe's was not producing tangible personal property for sale. At the hearing, Lowe's, through the testimony of its Director of Sales and Use Tax, established that its trash hauler, WISC, picked up the cardboard bales and also arranged for its sale to third-party recyclers. While the recyclers pay WISC directly for the bales, such payments to WISC are reported by Lowe's on its books as "recycling income." WISC offsets the amount of income it receives for the bales as a credit to Lowe's against WISC's monthly service invoices.

Having determined that these cardboard balers/compactors produce tangible personal property for sale, it must also be found that they, too, are exempt from the imposition of sales tax pursuant to Tax Law § 1115(a)(12).

H. Tax Law § 1115(a)(3) provides for an exemption from sales and use 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 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.

20 NYCRR 528.4(c) defines the term “medical equipment” for purposes of this exemption and provides, in pertinent part, as follows:

(1) *Medical equipment* means machinery, apparatus and other devices . . . 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.

*Example 1:* Items such as hospital beds, wheel chairs, hemodialysis equipment, iron lungs, respirators, oxygen tents, crutches, back and neck braces, trusses, trapeze bars, walkers, inhalators, nebulizers and traction equipment are exempt medical equipment.

*Example 2:* A medical patient purchases an air conditioner to be used to lower air temperature to alleviate his illness. Since an air conditioner is nonmedical in nature, it is not exempt from the tax.

*Example 3:* Orthodontic appliances are medical equipment.

*Example 4:* The purchase of a birth control device commonly known as an I.U.D. or intrauterine device is the purchase of medical equipment.

I. In *Matter of Craftmatic Comfort Manufacturing Corp.v. New York State Tax Commn.* (69 NY2d 755, 512 NYS2d 794, *revg* 118 AD2d 995, 500 NYS2d 206 *for reasons stated in dissent below*), the Court agreed with the dissenting memorandum of the Appellate Division that petitioner, a wholesaler and retailer of electrically adjustable beds, marketed its beds to groups which included but were not limited to those for whom such beds were a medical

necessity. The dissenting memorandum noted that while the beds could be used to fulfill a useful medical purpose, they were obviously also suitable for and were used by the general public. Since the petitioner failed to demonstrate that the beds were not generally useful for other than medical purposes, it was rational for the former State Tax Commission to conclude that petitioner failed to qualify for the exemption under Tax Law § 1115(a)(3).

In the present matter, petitioner contends that the electric Mart Carts were specifically purchased for use by handicapped individuals who would otherwise be unable to or have difficulty in walking the long shopping aisles in Lowe's stores. It also states that one of the primary reasons that Lowe's provides the Mart Carts is to comply with the public accommodation provisions of the Americans With Disabilities Act. While the purpose for which Lowe's purchased the Mart Carts may well have been to aid its disabled customers, it is clear that the carts provided by Lowe's are a convenience to assist in customer comfort. They are available to the general public and can be utilized by those customers who, for whatever reason, choose to ride rather than walk through Lowe's expansive stores. For example, a customer who, while not ill or disabled, is elderly or too tired to walk through the store may use the Mart Cart. Even though the majority of its users may be those who are in some way disabled, the Mart Carts, in order to qualify for this exemption, "must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity." (20 NYCRR 528.4[c][2].) Petitioner has failed to sustain its burden of proving that the Mart Carts were not generally useful for other than medical purposes. Accordingly, their purchase by Lowe's was not exempt from sales and use tax pursuant to Tax Law § 1115(a)(3).

J. By virtue of Conclusions of Law "F" and "G", Lowe's is entitled to a refund of sales and use tax paid in the amount of \$24,235.76 (*see*, Finding of Fact "16"), plus appropriate

interest. As indicated in Conclusion of Law “I”, Lowe’s claim for refund in the amount of \$1,650.69 which represents tax paid on the purchase of the Mart Carts is denied.

K. The petition of Lowe’s Home Centers, Inc. is granted to the extent indicated in Conclusion of Law “J” and, except as so granted, is in all other respects denied.

DATED: Troy, New York  
March 11, 2004

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE