

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MOHAWK DENTAL SUPPLY CO., INC.  
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 March 1, 1978  
through February 28, 1981.

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DECISION

Petitioner, Mohawk Dental Supply Co., Inc., Celi Drive, East Syracuse, New York 13057, 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 March 1, 1978 through February 28, 1981 (File No. 38029).

On August 12, 1983, petitioner filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the contents of the file with all briefs to be submitted by November 1, 1983. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether certain products sold by petitioner to dentists are exempt from the imposition of sales and use taxes under section 1115(a)(3) of the Tax Law.

II. Whether section 1115(a)(3) of the Tax Law is unconstitutional.

FINDINGS OF FACT

1. Petitioner, Mohawk Dental Supply Co., Inc., was engaged in the sale of dental supplies and equipment.

2. On September 20, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner covering the period March 1, 1978 through February 28, 1981 for taxes due of \$2,802.16, plus interest of \$442.99, for a total of \$3,245.15.

3. On audit, the Audit Division examined sales invoices for 1980 and found that petitioner failed to collect tax on sales of certain dental supplies for which no exemption certificates were on file. These items amounted to \$16,269.89, or .95 percent of reported taxable sales. This percentage was applied to reported taxable sales for the audit period of \$4,590,967.00 to determine additional taxable sales of \$43,614.19 and tax due thereon of \$2,802.16. Petitioner executed an agreement dated July 14, 1981 whereby it agreed to the use of the year 1980 as a basis for determining any sales tax liability for the entire period under audit.

4. The Audit Division relied on audit guidelines for dental laboratories in determining the taxability of the products sold by petitioner. These guidelines classified items sold by dental laboratories as taxable or exempt:

<u>Exempt</u>	<u>Taxable</u>
dentures	orthodontic appliances
partial dentures	precious metals
bridges	non-precious metals
artificial teeth	porcelain and acrylics
crowns	restorative and filling materials
drugs	dental cements
reline kits	furniture and fixtures
repair services	tools and equipment

5.(a) Following the audit, a conference was held with petitioner and, as a result, the Audit Division requested the Technical Services Bureau to review the taxability of certain products sold to dentists. Descriptions of items and their use were provided for certain products. Two of such products were Cavit and Nupro.

(b) Cavit is a premixed premier temporary seal and filling. Its ingredients are: zinc oxide, calcium sulfate, zinc sulfate, glycolacetate, polyvinylacetate, polyvinylchloride-acetate, triethanolomine and red pigment. Nupro is a prophylaxis paste for cleaning and polishing teeth. It is used only by individuals professionally trained to perform dental prophylaxis. The manufacturer's information regarding Cavit states that it is not a medication in itself. The literature states further that Cavit is compatible for use with all drugs.

(c) The Technical Services Bureau advised the Audit Division of its determination as to the taxable status of various products. The Bureau was unable to make a determination on some items because of insufficient information. The Bureau's determinations, except for four items, were consistent with the Audit Division's and, therefore, no revisions were made to the audit assessment. (The four exceptions were determined taxable by Technical Services and exempt by the Audit Division.)

6. Petitioner argued that many of the products determined taxable contain drugs as ingredients and that all are used for the same basic purpose, that is, treatment of the disease of tooth decay. Moreover, petitioner argued that section 1115(a)(3) of the Tax Law provides no ascertainable standards, and is ambiguous and unconstitutional in failing to provide a reasonable degree of certainty and definitiveness.

#### CONCLUSIONS OF LAW

A. That section 1115(a)(3) of the Tax Law provides an exemption from sales and use taxes for "(d) rugs 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... but not including...supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation."

The regulations provide, in part:

"Medical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax... Example 4: Dental supplies such as porcelain, mercalloy, gold, silver, acrylic denture base, amalgam, composite resin, silicate, and dental floss are not exempt when purchased by a dentist who will use them in performing a dental service for compensation." 20 NYCRR 528.4(h)(1).

The distinction which the statute (Tax Law section 1115[a][3] and [4]) and the regulations (20 NYCRR 528.4 and 528.5) draw between filling substances, which are not exempt, and prosthetic aids, such as false teeth and permanently attached crowns which are exempt, has been held to be reasonable (Dental Society of State of N.Y. v. N.Y.S. Tax Comm., 110 A.D.2d 988, affd. 66 N.Y.2d 939).

B. That the language of section 1115(a)(3) of the Tax Law and regulation section 528.4 is clear in that an exemption is not applicable to supplies used for the treatment of disease when purchased by a person performing dental services. Exempt purchases by a dentist are limited to drugs and medicines. The mere presence of a drug ingredient in a product does not necessarily make the item a drug or medicine. Petitioner failed to establish that any of the items determined taxable by the Audit Division were drugs or medicines rather than supplies.

C. That the constitutionality of the laws of New York and of the application thereof in particular instances is presumed at the administrative level of the State Tax Commission. Petitioner's claim that Tax Law section 1115(a)(3) provides no ascertainable standards is unconvincing. During the period under consideration, regulations were in force which interpreted the statute and

furnished examples as guidance. Furthermore, "[s]tatutes creating a tax exemption are to be strictly and narrowly construed (citations omitted)."


(Dental Society of State of N.Y., supra, 110 A.D.2d at 989.)

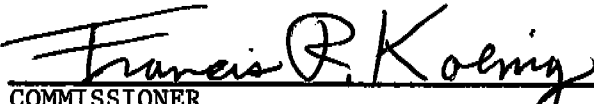
D. That the petition of Mohawk Dental Supply Company, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

**AUG 08 1986**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER