

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mayflower Podiatry Supply Co. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 of the Tax Law for the Periods :
Ending 8/31/71-12/31/73.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Mayflower Podiatry Supply Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mayflower Podiatry Supply Co.
28 Jericho Tpk.
Jericho, NY 11753

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of November, 1981.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Mayflower Podiatry Supply Co.

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: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 of the Tax Law for the Periods :
Ending 8/31/71-12/31/73

:

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Howard L. Blau the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard L. Blau
Blau & Damaded, Esqs.
217 Newbridge Road
Hicksville, NY 11801

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of November, 1981.

James A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 6, 1981

Mayflower Podiatry Supply Co.
28 Jericho Tpk.
Jericho, NY 11753

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Howard L. Blau
Blau & Damaded, Esqs.
217 Newbridge Road
Hicksville, NY 11801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

MAYFLOWER PODIATRY SUPPLY CO. :

DECISION

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the periods ending :
August 31, 1971 through December 31, 1973. :

Petitioner, Mayflower Podiatry Supply Co., 28 Jericho Turnpike, Jericho, New York 11753, 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 periods ending August 31, 1971 through December 31, 1973 (File No. 10714).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 11, 1978 at 1:15 P.M. and continued on February 5, 1979 at 1:30 P.M. before Herbert Carr, Hearing Officer. Applicant appeared by Blau & Damadeo, Esqs. The Audit Division appeared by Peter Crotty, Esq. (Bruce M. Zalaman, Esq., of counsel).

ISSUE

Whether items sold by applicant were exempt from tax under subdivisions (a) (3) or (a) (4) of section 1115 of the Tax Law. (All references are statutes and rules in effect during the period June 1, 1971 through December 31, 1973.)

FINDINGS OF FACT

1. On July 2, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the tax periods ending August 31, 1971 through December 31, 1973.

2. During the tax periods at issue, petitioner was a partnership composed of Bernard Farhman, Melvin Katz and Marion Rappeport. Petitioner was engaged

in the sale of podiatry supplies primarily to podiatrists, V.A. Hospitals and infrequently to the public.

3. The Bureau conducted a field audit on or about May 9, 1975 and determined that a variety of items sold by the petitioner, which had been treated as exempt, were in fact taxable. A test sample of petitioner's receipts was taken and the Bureau determined that there were additional taxable sales of \$105,730.07, based upon a test percentage of 8.68535 percent resulting in additional tax of \$7,036.45. Petitioner was also given a credit of \$249.78. The Notice of Determination demanded a payment of \$6,844.24 + \$2,583.27 (penalty and interest) totalling \$9,427.51.

4. The specific items at issue and their uses are as follows:

- (a) Rohadur: Orthopedic material; doctor heats, shapes, corrects and trims form to make orthopedic appliances for corrective therapy.
- (b) Corn Pads: Corrective device; doctor places on foot and shapes pad to accommodate patients needs.
- (c) Ace Bandages: Elastic bandage; applied by doctor to parts of the foot and leg to correct swelling and alleviate pressure due to injury.
- (d) Walking Heel: Rubber heel; doctor applies to cast he has made and incorporates into cast so patient can be ambulatory.
- (e) Reece Shoe: Orthopedic shoe; doctor applies to surgical patient or patient with cast for protection and adds surgical support where needed.
- (f) Plastic Bunion Shield: Latex appliance for corrective therapy of toes; doctor modifies appliances to correct conditions such as hammer toes, bunions, etc.
- (g) T 148: Bunion shield; doctor adds padding to shield to help in bunion condition.
- (h) 8154: Buttress pads; doctor applies underneath toes to alleviate different conditions and adds padding where necessary.
- (i) Rolofoam: Padding material used by podiatrist to cushion and protect various parts of the feet; podiatrist cuts, shapes and alters original material to make a corrective appliance for patient.

- (j) Arch Pads #6000: Arch binder; is applied and placed by doctor to correct problem with instep.
- (k) Property Pads: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.
- (l) Foam Pads: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.
- (m) Castofoam: Podiatrist takes imprint of patient's foot so that he may apply corrective measures; doctor adds plaster to impression and forms corrective mold for making orthopedic support.
- (n) Felt Pads: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.
- (o) Moleskin Pads: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.
- (p) Peg Bandage: Cohesive bandage; applied by doctor to reduce swelling and straps foot in case of sprain and injury.
- (q) Toe Caps: Protective enclosure; doctor applies to specific toe for protection of injury and sometimes adds padding or builds it up with latex material.
- (r) Met Pads: Metatarsal support; doctor takes pad, positions it in shoe; adheres it and adjusts height, higher or lower to correct patient's condition.
- (s) Pedi Foam Sleeve: Padding material used by podiatrist to cushion and protect various parts of the feet; podiatrist cuts, shapes and alters original material to make a corrective appliance for patient.
- (t) Heel Cups: Heel protector; is applied to patient foot and then corrective padding added to treat condition.
- (u) Hammer Toe Regulator: Placed on foot by doctor, adjusted to individual toe and padding added as required by doctor.
- (v) Protective Enclosure: Doctor applies to specific toe for protection of injury and sometimes adds padding or builds it up with latex material.
- (w) Leather Molded Shell: Doctor obtains shape of patients foot then applies protective padding to balance patients foot problem.
- (x) Molo: Rubberized cork sheet; doctor cuts impression of the foot and then builds up various material to make a finished support.
- (y) Mod Insoles: Corrective appliance for balance therapy; doctor takes impression of patient's foot and adds various materials to obtain finished support for patient.

- (z) Pedi Foam: Padding material used by podiatrist to cushion and protect various parts of the feet; podiatrist cuts, shapes and alters original material to make a corrective appliance for patient.
- (aa) Heel Protectors: Heel protector; is applied to patients foot and then corrective padding added to treat condition.
- (bb) Splints: Plaster bandage; doctor activates and applies to patient to make impression or for splinting fractured or broken limbs.
- (cc) Scaphoid Pads: Metatarsal support; doctor takes pad, positions it in shoe; adheres it and adjusts height, higher or lower to correct patient's condition.
- (dd) #4918: Corrective device for conditions of imbalance and supplementary conditions such as corns, bunions, etc.; doctor takes appliance, corrects it by various methods; heating, etc. adds corrective device to be applied, builds it up and covers it so that it will correct condition of patient.
- (ee) #1500: Corrective device for conditions of imbalance and supplementary conditions such as corns, bunions, etc.; doctor takes appliance, corrects it by various methods; heating, etc. adds corrective device to be applied, builds it up and covers it so that it will correct condition of patient.
- (ff) #4800: Corrective device for conditions of imbalance and supplementary conditions such as corns, bunions, etc.; doctor takes appliance, corrects it by various methods; heating, etc., adds corrective device to be applied, builds it up and covers it so that it will correct condition of patient.
- (gg) Molo Insoles: Corrective appliance for balance therapy; doctor takes impression of patient's foot and adds various materials to obtain finished support for patient.
- (hh) #7A Foam Pads: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.
- (ii) #6035: Traction splint; doctor applies to big toe to correct hallux valgus condition by adjusting traction when needed; additional padding is sometimes necessary.
- (jj) PSL: Orthopedic shoe; doctor applies to surgical patient or patient with cast for protection and adds surgical support where needed.
- (kk) Tourque Heel: Corrective device; doctor applies to shoe of patient to correct toe-in toe-out conditions adjusting periodically.

- (ll) #4825: Corrective device for conditions of imbalance and supplementary conditions such as corns, bunions, etc.; doctor takes appliance, corrects it by various methods; heating, etc., adds corrective device to be applied, builds it up and covers it so that it will correct condition of patient.
- (mm) Felt Toe Sling: Corrective dressing; applied by doctor to alleviate pressure in certain conditions.

CONCLUSIONS OF LAW

A. The following items are found to be exempt: corn pads, bunion shields, plastic bunion shields, items #1500, #4800, #4825 and #4918, #8154 buttress pads, arch pads, property pads, foam pads, felt pads, moleskin pads, met pads, scaphoid pads, #7A foam pads, rolofoam, pedfoam and pedfoam sleeve. These items are either identical to or indistinguishable from such products as corn pads and callous plasters which are specifically deemed exempt by ST-375 (7/65) which was the applicable guideline at the time in issue and upon which the taxpayer justifiably relied. (Tax Law, §1115(a)(3).)

B. All remaining items are deemed taxable, including; rohadur, ace bandages, Reece shoes, walking heels, castofoam, peg bandages, toe caps, heel cups, heel protectors, hammer toe regulators and shields, leather molded shells, protective enclosures, molo, mod insoles, splints, traction splints, PSL orthopedic shoes, tourque heels and felt toe slings. These items constitute taxable medical supplies and/or orthopedic appliances. (ST-375, 7/65.)

C. Petitioner failed to establish by a preponderance of the credible evidence that any of the disputed items constitute prosthetic aids. While some of the disputed items were indeed customized to some degree by the podiatrist, they were not in customized form at the time they were sold by the petitioner. Moreover, there was no evidence that any disputed items were intended to replace missing or permanently malfunctioning body parts. (Tax Law, §1115(a)(4).)

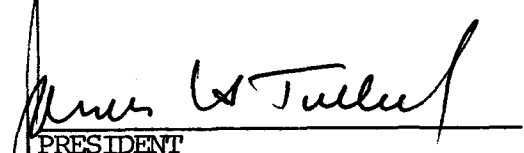
D. The application of Mayflower Podiatry Supply Co. is granted to the extent indicated in Conclusion of Law "A". The Audit Division is directed to

modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 2, 1975, and that except as so granted, the application in in all other respects denied.


DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER