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April 14, 2010

<REQUESTER>
<COMPANY>

Formal Ruling 2010-06

Dear <REQUESTER>:

You have requested a formal ruling on behalf of <COMPANY> concerning the taxability of the <PRODUCT> line of custom fitted sports mouth guards. Specifically, you ask whether the mouth guards are exempt as dental services, as prescription medical devices, as prosthetic devices, or as safety gear, when sold to dentists for resale. In addition, you ask whether <COMPANY> may accept a resale certificate from its customers so they may purchase the item tax free, and whether they should then charge sales tax to their patients.

Clearly, the mouth guards are tangible personal property, rather than a service. *See* 32 V.S.A. § 9701(7) (definition of tangible personal property). The retail sale in this state of tangible personal property is taxable unless it falls within an enumerated exemption. 32 V.S.A. § 9771(1) (imposition of sales tax).

Based on the information you provided, sales of mouth guards by <COMPANY> to dentists are not retail sales. A retail sale “means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.” 32 V.S.A. § 9701(5). <COMPANY> sells the mouth guards to dentists, who then resell them to their patients. In this scenario, <COMPANY>, as vendor, does not collect the tax from its clients, but should instead obtain exemption certificates from their clients/retailers. *See* 32 V.S.A. § 9745(a) (“Certificate or affidavit of exemption”); Reg. § 1.9745.

Sales of the mouth guards by dentists to their patients are retail sales of tangible personal property. The Vermont legislature has crafted a so-called medical exemption from the tax; its scope, however, is limited to:

[d]rugs intended for human use, durable medical equipment, mobility enhancing equipment and prosthetic devices and supplies . . . used in treatment intended to alleviate human suffering or to correct, in whole or in part, human physical disabilities.

32 V.S.A. § 9741(2).

Under the plain statutory language, mouth guards do not fall within the exemption. They do not “serve a medical purpose [and are] not useful to a person in the absence of illness or injury.” 32 V.S.A. § 9701(30) (definition of durable medical equipment); Reg. § 1.9741(2)(D)(1). They are not “primarily

and customarily used to provide or increase the ability to move from one place to another.” 32 V.S.A. § 9701(34) (definition of mobility-enhancing equipment); Reg. § 1.9741(2)(D)(2). They do not “artificially replace a missing portion of the body, prevent or correct a physical deformity or malfunction, or support a weak or deformed portion of the body.” 32 V.S.A. § 9701(35) (definition of prosthetic devices); Reg. § 1.9741(2)(E). Further, they are not medical supplies because they are not used in the treatment of illness or injury. Reg. § 1.9741(2)(F) (definition and examples of prosthetic devices).

Mouth guards fall squarely – and are expressly listed – within the statutory definition of “[s]ports or recreational equipment.” 32 V.S.A. § 9701(37); 32 V.S.A. § 9701(37)(G). Sports or recreational equipment is worn in conjunction with athletic activity and is not suitable for general use. It is not considered clothing, and unlike most clothing, is not exempt from the tax. This is true even when the item is customized and fitted by a dentist. *Cf.* 32 V.S.A. § 9771(3) (fabrication of tangible personal property is subject to the tax).^{*} Accordingly, dentists selling the custom mouth guards to their patients should collect and remit sales tax on all Vermont sales.

This ruling will be made public after deletion of the parties’ names and any information which may identify the parties. A copy of this ruling showing the proposed deletion is attached, and you may request that within thirty (30) days the Commissioner delete any further information that might identify the interested parties. The final discretion as to deletions rests with the Commissioner.

This ruling is issued solely to your business and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department’s general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.

Section 808 of Title 3 provides that this ruling will have the same status as an agency decision or an order in a contested case. You have the right to appeal this ruling within thirty days.

Sincerely,

Judith Henkin
Attorney for the Department

Approved this ____ day of _____, 2010.

Richard Westman
Commissioner of Taxes

^{*} The charge to a patient for a custom mouth guard is not a charge for fabrication because the purchaser (patient) does not furnish the materials used in production of the mouth guard. Similarly, provision of the patient’s imprint is not fabrication because the imprint is not the actual material used to make the custom item.