

REPLY TO: P.O. BOX 429  
MONTPELIER, VERMONT 05601-0429  
Tel: (802) 828-2560  
Fax: (802) 828-5873  
TDD: (802) 828-2574

October 24, 2006

<name>  
<department>  
<company>  
<address>  
<city, state zip>

Formal Ruling 2006-07

Dear <name>:

You have requested a formal ruling on behalf of <company> as to whether the <device> is subject to the Vermont sales and use tax.

According to the promotional material you provided, <device> is a handheld, portable electronic device that is used to treat acne pimples in those individuals with mild to moderate acne. When held to the skin for approximately two and a half minutes, the device delivers a controlled dose of heat to the pimple. Two to three of these treatments over the course of 24 hours is recommended. <Product> is available without a prescription, and has been found effective in a clinical trial.

Vermont sales tax is imposed upon the receipts from the sale of tangible personal property sold at retail in this state. 32 V.S.A. § 9771(1). The legislature has exempted from the tax the retail sale of drugs intended for human use, durable medical equipment, mobility enhancing equipment and prosthetic devices and supplies used in treatment intended to alleviate human suffering or correct human physical disabilities. 32 V.S.A. § 9741(2).

<Device> is not exempt from the sales and use tax. Just as the Department does not recognize that all remedies marketed and promoted for use in the treatment of illnesses qualify as drugs, not all devices, even when designed and marketed for the treatment of a physical ailment or condition, necessarily qualify as durable medical equipment or supplies exempt from tax. The exemption extends only to items “commonly and primarily used in treatment”. Vt. Dept. of

Taxes Reg. § 1.9741 (2)-1 (a). \* Although [the] <device's> sole intended use is to treat mild to moderate acne, it is not considered a common or customarily used treatment by the medical community. For example, organizations such as the National Institute of Health's National Institute of Arthritis and Musculoskeletal and Skin Diseases, the American Academy of Dermatology, and the Mayo Clinic do not recognize this specific treatment method – the electronic delivery of heat through a metal pad – as a common, effective or recommended acne treatment. *See, e.g.*, [http://www.niams.nih.gov/hi/topics/acne/acne.htm#acne\\_e](http://www.niams.nih.gov/hi/topics/acne/acne.htm#acne_e), NIH Publication No. 06-4998 (Jan. 2006); <http://www.skincarephysicians.com/acnet.net>; <http://www.mayoclinic.com/health/acne-treatments/SN00038>.

In addition, because <device> is intended to be used only by persons with mild to moderate acne, the primary benefit and use of the product appears to be cosmetic, rather than medical. Indeed, the promotional material acknowledges that more severe acne requires a physician's care and often entails the use of other physician-recommended therapies, while [the] <device> may be used "for the occasional pimple." Just as the medical exemption does not extend to grooming and hygiene products, the Department does not interpret the exemption to include products that produce a primarily cosmetic, rather than medical benefit.

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

---

\* The Department has recently revised its sales and use tax laws to conform to requirements of the Streamlined Sales Tax Agreement (SSTA), a multi-state initiative designed to promote simplification of, and thus enhanced compliance with, sales and use tax laws nationwide. Changes in the law are scheduled to take effect on January 1, 2007. In tandem with changes in the law, the Department is currently in the process of promulgating new sales and use tax regulations. Though the language used here is derived from current regulation, this ruling is consistent with the Department's construction of the proposed law and regulations.

Approved this \_\_\_\_ day of \_\_\_\_\_, 2006.

---

Tom Pelham  
Commissioner of Taxes