STATE OF COLORADO

DEPARTMENT OF REVENUE
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John W. Hickenlooper
Governor

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GIL -12-002

February 14, 2012

XXXXXXXXXXXX
ATTN: XXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX

Re: Bio-engineered Medical Device/Orthotic

Dear XXXXXXXX,

You submitted on behalf of XXXXXXXXX ("Company") a request for guidance on the application of sales tax on the sale of your Bio-engineered Medical Device/Orthotic (Product). The department issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issue, but does not provide a determination regarding a specific set of facts and is not binding on the department. A private letter ruling provides a determination for a specific set of facts, is binding on the department but not the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at www.taxcolorado.org > FYI/Publication > Rulings.

The department initially treats your request as one for a general information letter. If you would like the department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with regulation 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law, not determinations of the tax consequences on any specific circumstance and are not binding on the department.

Issue

Is the sale of Product exempt from sales and use tax?

Background

Company sells what is characterized as "bio-engineered orthotics." The correspondence does not describe the specifics of the product other than to stress "it is custom made to fit the individual" (purchaser) and aids the function of an individual's feet by placing a "person's feet in proper alignment based on their unique body requirements." We assume from this description that the product is manufactured for insertion into an individual's footwear (shoe insert).

Discussion

Colorado imposes sales tax on the sale of tangible personal property. Certain medical devices and supplies are exempt from sales and use tax. Insofar as relevant to Company's Product, Colorado exempts prosthetic devices and durable medical equipment, which we discuss below. §39-26-717, C.R.S.

The department defines a prosthetic device as an artificial device which aids or replaces a bodily function and which is designed, manufactured, or adjusted to fit a particular individual. Department regulation (39)-26-717.1 Prosthetic devices that replace a body part of function include such things as artificial limbs, glass eye, and teeth implants. Prosthetic devices that do not replace a body part or function, but which aid in the functioning of a body part include such items as eyeglasses and a cardiac pacemaker. In contrast, devices that treat or cure an injury are generally classified as a therapeutic device and not prosthetic device. Colorado does not exempt the sale of therapeutic device as a class, although Colorado does exempt certain therapeutic devices. §39-26-717, C.R.S.

Your correspondence describes the Product as "aiding" a person's foot by placing the foot "in proper alignment based upon their individual body requirements." Colorado is cautious in extending the prosthetic exemption to shoe inserts. For example, many shoe manufacturers represent that their shoe design will have ameliorative effects on posture, spine alignment, arch support, muscle tone, and on other foot related issues. Manufacturers of bed pillows and mattresses make similar claims. However, we do not believe that the prosthetic device exemption extends to these types of products.

Our research suggests that many, if not most, states that have addressed orthotic shoe inserts have restricted the exemption only to cases where there is a demonstrated medical necessity. See, e.g., Cal. Code of Regs. 1591, Fla. Admin. Code Ann. 12A-1.020, Illinois Private Letter Ruling No. ST 95-0059-PLR, 02/02/1995 , Missouri Private Letter Ruling No. L6177, 08/24/1992, RCW 82.08.0283 We also note that the Federal Medicare program excludes similar products from coverage.[1]

When there is some ambiguity whether a product falls within an exemption, courts and the Department are guided by rules of statutory construction. In general, exemptions are narrowly construed and are not applied unless the product clearly falls within the exemption. *Security Life & Accident Co. v. Heckers*, 177 Colo. 455, 495 P. 2d 225, 226 (1972).

Colorado also exempts durable medical equipment. §39-26-717, C.R.S. However, in order to qualify for this exemption, the equipment must meet the following conditions: (1) withstand repeated use; (2) is primarily and customarily used to serve a medical purpose; (3) is

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[1] The Federal Medicare Program will not cover as medially necessary:

1. the treatment of flatfoot conditions and the prescription of supportive devices therefore;
2. the treatment of subluxations [incomplete or partial dislocation of a bone or joint] of the foot; or
3. routine foot care (including the cutting or removal of corns or calluses.42 U.S.C. Section 1395(y)(13)

generally not useful to a person in the absence of illness or injury, (4) is not worn in or on the body; and (5) is prescribed by a licensed medical provider.

Because this is a general information letter, we do not determine here whether the Product falls within either exemption. A general information provides an overview of the tax provisions that may apply. Moreover, the information provided on the Product is lacking in particulars which would be necessary for such a determination. As noted above, you may apply for a private letter ruling to request such a determination.

Miscellaneous

Pursuant to state law and department regulation 24-35-103.5, noted above, the Department will make public a redacted version of this letter. Your letter requesting this general information is not made public. I enclosed a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments or objection concerning the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Neil Tillquist
Colorado Department of Revenue