

ST 15-14

Tax Type: Sales Tax

Tax Issue: Medicines & Medical Appliance Exemption (Low Rate)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC BUSINESS LLC,
Taxpayer

No.	XXXX
Account ID	XXXX
Letter ID	XXXX
	XXXX
Period	1/1/07-8/31/12

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Thomas Pliura, Esq. for ABC BUSINESS LLC; Heidi Scott, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This cause came on to be heard following an audit performed upon the above-named taxpayer by an auditor of the Illinois Department of Revenue (“Department”) for the period January 1, 2007 through August 31, 2012. After conducting the audit, the Department’s auditor caused to be issued Form EDA-105-R, ROT Audit Reports which served as the basis for subsequently issued Notices of Tax Liability whose timely protest by the taxpayer has resulted in this contested case.

Prior to the convening of an evidentiary hearing, the parties agreed to certain stipulations, which are enumerated below, and further agreed to forego an evidentiary hearing in this case and to allow it to be decided based upon the stipulated record. After considering the evidence included in the record, I recommend that this matter be resolved in favor of the Department. In support of this recommendation, the following “Findings of Fact” and “Conclusions of Law” are made.

Findings of Fact:

I find the facts to be as stipulated between the parties in the “Stipulations of Facts and Waiver of Oral Hearing” filed December 19, 2013 (“Stip.”), which are as follows:

1. On October 4, 2013 Kendra Dye, an auditor from the Illinois Department of Revenue (“Department”) initiated an audit of ABC BUSINESS LLC (“Taxpayer”) and the in-person opening conference with the representative of the Taxpayer was held on October 15, 2012.
Stip. 1.
2. On November 20, 2012 a meeting was held in person between Ms. Dye and a representative of the Taxpayer to review the audit results which were as follows:

Use Tax Due	\$XXXX
Interest	\$ XXXX
Penalty	\$ XXXX
Liability Established Per Audit	\$ XXXX

Stip. 2.

3. On February 22, 2011 the audit was closed as “unagreed.” Stip. 3.

4. On April 9, 2013 the following nine (9) Notices of Tax Liability for Form EDA-105-R, ROT Audit Report were issued to the Taxpayer for a total liability amount of \$32,337.78:

<u>Letter ID</u>	<u>Reporting Period</u>
XXXX	1/1/07-6/30/09
XXXX	7/1/09-1/31/12
XXXX	2/1/12-2/19/12
XXXX	3/1/12-3/31/12
XXXX	4/1/12-4/30/12
XXXX	5/1/12-5/31/12
XXXX	6/1/12-6/30/12
XXXX	7/1/12-7/31/12
XXXX	8/1/12-8/31/12

Stip. 4

5. On April 23, 2013 Taxpayer timely filed Protests to each of the nine (9) above listed Notices of Tax Liability. Stip. 5.

In addition to the foregoing facts, based upon the documentary evidence and admissions contained in the record, I further find as follows:

6. The Taxpayer is a state licensed ambulatory surgical center. Taxpayer's Memorandum in Opposition to Notices of Tax Liability ("Taxpayer's Brief") p. 1.
7. Taxpayer makes purchases of various appliances, devices and supplies utilized in the care and treatment of its patients. *Id.*; Taxpayer's Brief Ex. A. The record contains no evidence that any of these items were used to replace malfunctioning parts of the human body.

8. During her audit of the taxpayer, Kendra Dye, the Department's auditor determined that the Taxpayer was required to register as a retailer with the Department and file ST-1 Sales/Use Tax Returns. Department Ex. 4 (Affidavit of Kendra Dye, p. 1).¹
9. During the tax period in controversy, no Illinois use taxes were collected from the Taxpayer on the Taxpayer's purchase of appliances, devices and supplies used to treat the Taxpayer's patients and the Taxpayer paid no use taxes on any of the aforementioned items. *Id.*

Conclusions of Law:

Illinois imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. If the person who uses the property does not pay the use tax to the retailer, that person must pay it directly to the Department. 35 ILCS 105/3-45. In the instant case, the Department has assessed use tax on items purchased at retail by the Taxpayer on which no use taxes were paid. Stip. 2.

Section 105/3-10 of the Use Tax Act, 35 ILCS 105/3-1 *et seq.* imposes a 1% rate of tax rather than the generally applicable 6.25% rate of tax on "medical appliances" sold for human use. 35 ILCS 105/3-10 ("section 105/3-10"). This section is identical to section 120/2-10 of the Retailers' Occupation Tax Act which also imposes tax on "Medical Appliances" at the 1% tax rate.

In the exercise of its authority to promulgate rules and regulations to enforce the State's tax statutes pursuant to 20 ILCS 2505/2505-795, the Department has adopted regulations 86 Ill. Admin. Code, ch. I, section 130.310(c)(2) ("Regulation 130.310(c)(2)") (effective until August 19, 2010) and 86 Ill. Admin. Code, ch. I, section 130.311 ("Regulation 130.311") (effective on and after August 19, 2010) which define what constitutes "medical appliances." See 34 Ill. Reg.

¹ The record does not indicate the factual basis for the auditor's determination that the Taxpayer was required to be registered as a retailer and file sales and use tax returns.

12935. Although Regulation 130.310(c)(2) and Regulation 130.311 are Retailers' Occupation Tax Act regulations and construe section 35 **ILCS** 120/2-10 of that Act, these regulations also construe the applicability of the Use Tax Act as a consequence of section 105/3-65 of the Use Tax Act, which provides as follows:

R.OT. nontaxability. If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act does not apply to the use of the tangible personal property in this State.
35 **ILCS** 105/3-65.

Accordingly, "medical appliances" are taxable under the Use Tax Act only to the extent taxable under the Retailers' Occupation Tax Act which Regulation 130.310(c)(2) and Regulation 130.311 construe.

Pursuant to Regulation 130.310(c)(2) and Regulation 130.311, "medical appliances" to which the lower tax rate applies are items "used to directly substitute for a malfunctioning part of the human body." The Taxpayer, a state licensed ambulatory surgical center making purchases of various medical devices and supplies utilized in the care and treatment of its patients (Taxpayer's Brief, p.1) contests the limitation of "medical appliances" to which the lower tax rate applies to items "used to directly substitute for a malfunctioning part of the human body" in Regulation 130.310(c)(2) and Regulation 130.311.

The record in this case indicates that, during the tax period at issue, the Taxpayer made purchases of various medical devices and supplies which it used in the care and treatment of its patients. Taxpayer's Brief, p. 1; Taxpayer's Brief Ex. A. During the tax period in controversy, it paid no use tax to retailers from which it purchased these items and reported no use tax to the Department on these purchases. Department Ex. 4 (Affidavit of Kendra Dye, p. 1).

Section 105/3-10 provides, in part:

Unless otherwise provided in this Section, the tax imposed by this Act is at the rate of 6.25% of either the selling price or the fair market value, if any, of tangible personal property ...

With respect to ... prescription and nonprescription medicines, drugs, medical appliances and insulin, urine testing materials, syringes, and needles used by diabetics, for human use, the tax is imposed at the rate of 1%. (emphasis supplied)

35 **ILCS** 105/3-10

Section 105/3-10 does not provide a complete exemption for medical appliances. Medical appliances are not completely exempt under Illinois law, but are taxable at a reduced tax rate. *Id.* Consequently, even if section 105/3-10 accorded a reduced tax rate to the Taxpayer's purchases of medical devices and supplies as the Taxpayer contends, the Taxpayer would remain liable for a portion of the tax due on its purchases at issue in this controversy.

The Department established its presumptively correct *prima facie* case when it introduced the Notices of Tax Liability at issue into the record.² See 35 **ILCS** 120/4 as incorporated into the Use Tax Act pursuant to 35 **ILCS** 105/12. The burden of going forward and rebutting the Department's presumptively correct determination then shifted to the Taxpayer. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1st Dist. 1987); Vitale v. Illinois Department of Revenue, 118 Ill. App. 3d 210 (3d Dist. 1983). A taxpayer can overcome the Department's *prima facie* case only by producing competent evidence closely identified with the taxpayer's books and records. *Id.*

Section 105/3-10 noted above, which taxes medical appliances at the rate of 1%, does not define the term "medical appliances." It only provides that they must be for human use. However, as also noted, the Department has adopted a regulation that defines this term. The

² Pursuant to 35 **ILCS** 120/4, the Department's Notices of Tax Liability are entitled to a presumption of correctness. See Balla v. Department of Revenue, 96 Ill. App. 3d 293 (1st Dist. 1981), wherein the Illinois Appellate Court states the following: "The Illinois legislature, in order to aid the Department in meeting its burden of proof ..., has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct." Balla, *supra* at 295.

applicable regulation interpreting the term “medical appliances” for the portion of the tax period at issue preceding August 19, 2010, is Regulation 130.310(c)(2) which is in effect for the period at issue, provides in relevant part as follows:

(c) Medicines and Medical Appliances

(2) A medical appliance is an item that is intended by its manufacturer for use in directly substituting for a malfunctioning part of the human body. These items may be prescribed by licensed health care professionals for use by a patient, purchased by health care professionals for the use of patients, or purchased directly by individuals. Purchases of medical appliances by lessors that will be leased to others for human use also qualify for exemption. Included in the exemption as medical appliances are such items as artificial limbs, dental prostheses and orthodontic braces, crutches and orthopedic braces, wheelchairs, heart pacemakers, and dialysis machines (including the dialyzer). Corrective medical appliances such as hearing aids, eyeglasses and contact lenses qualify for exemption. Diagnostic equipment shall not be deemed a medical appliance, except as provided in Section 130.310(d). Other medical tools, devices and equipment such as x-ray machines, laboratory equipment, and surgical instruments that may be used in the treatment of patients but that do not directly substitute for a malfunctioning part of the human body do not qualify as exempt medical appliances. Sometimes a kit of items is sold so the purchaser can use the kit items to perform treatment upon himself or herself. The kit will contain paraphernalia and sometimes medicines. An example is a kit sold for the removal of ear wax. Because the paraphernalia hardware is for treatment, it generally does not qualify as a medical appliance. However, the Department will consider the selling price of the entire kit to be taxable at the reduced rate when the value of the medicines in the kit is more than half of the total selling price of the kit.

86 Ill Admin. Code, Ch. I, section 130.310(c)(2).

Effective August 19, 2010, the subsection of the Department’s regulations defining the term “medical appliances” has been removed from Regulation 130.310(c)(2) and included within a newly numbered Regulation 130.311 bearing the heading, “Drugs, Medicines, Medical Appliances and Grooming and Hygiene Products.” See 34 Ill. Reg. 12935. Accordingly, for the portion of the period at issue commencing August 19, 2010, the applicable regulation

interpreting section 105/3-10 is Regulation 130.311. The relevant portion of Regulation 130.311 pertaining to the definition of the term “medical appliances” provides as follows:

d) Medical Appliances. A medical appliance is an item that is used to directly substitute for a malfunctioning part of the human body.

1) For purposes of this Section, an item that becomes part of the human body by substituting for any part of the body that is lost or diminished because of congenital defects, trauma, infection, tumors or disease is considered a medical appliance. Examples of medical appliances that will qualify the product for the low rate of tax include, but are not limited to:

- A) breast implants that restore breasts after loss due to cancer;
- B) heart pacemakers;
- C) artificial limbs;
- D) dental prosthetics;
- E) crutches and orthopedic braces;
- F) dialysis machines (including the dialyzer);
- G) wheelchairs;
- H) artificial limbs; and
- I) mastectomy forms and bras.

2) Corrective medical appliances such as hearing aids, eyeglasses, contact lens and orthodontic braces qualify as medical appliances subject to the low rate of tax.

3) Sterile band-aids, dressings, bandages and gauze qualify for the low rate because they serve as a substitute for skin.

4) Items transferred incident to cosmetic procedures are not considered medical appliances. For purposes of this Section, a cosmetic procedure means any procedure performed on an individual that is directed at improving the individual’s appearance and that does not prevent or treat illness or disease, promote function of the body or substitute for any part of the body that is lost or diminished because of genital defects, trauma, infection, tumors or disease. Cosmetic procedures include, but are not limited to, elective breast, pectoral or buttock augmentation.

5) Diagnostic equipment shall not be deemed a medical appliance, except as provided in Section 130.310(d). Other medical tools, devices and equipment such as x-ray machines, laboratory equipment and surgical instruments that may be used in the treatment of patients but that do not directly substitute for a malfunctioning part of the human body do not qualify as medical appliances. Sometimes a kit of items is sold where the purchaser will use the kit items to perform treatment upon him or herself. The kit will contain paraphernalia and sometimes medicines. An example is a kit sold for the removal of ear wax. Because the paraphernalia hardware is for treatment, it generally does not qualify as a medical appliance. However, the Department will consider the selling price of the entire kit to be taxable at the reduced rate

when the value of the medicines in the kit is more than half of the total selling price of the kit.

6) Supplies, such as cotton swabs, disposable diapers, toilet paper, tissues and towelettes and cosmetics, such as lipsticks, perfume and hair tonics, do not qualify for the reduced rate.

7) Medical appliances may be prescribed by licensed health care professionals for use by a patient, purchased by health care professionals for the use of patients or purchased directly by individuals. Purchases of medical appliances by lessors that will be leased to others for human use also qualify for the reduced rate of tax.

86 Ill. Admin. Code, ch. I, section 130.311.

Because the period at issue in this case is January 1, 2007 through August 31, 2012, both Regulation 130.310(c)(2) and Regulation 130.311 are applicable to the tax period in controversy. As is evident from the foregoing, both Regulation 130.310(c)(2) and Regulation 130.311 define “medical appliances” in the manner to which the Taxpayer objects by confining the category of items eligible for tax relief pursuant to section 105/3-10 to items used to substitute for malfunctioning parts of the human body.

With respect to the applicability of section 105/3-10 to the facts presented in this case, the Taxpayer argues as follows:

Through its interpreting regulation, IDR [i.e. the Department] has restricted the application of the low tax rate on medical appliances from “an instrument, apparatus, or device for a particular [medical] purpose or [medical] use” [the dictionary definition] to a greatly restricted subset of only those medical appliances that are, “used to directly substitute for a malfunctioning part of the human body”. The regulation goes on to clarify this improper restriction to state, “Other medical tools, devices and equipment such as x-ray machines, laboratory equipment and surgical instruments that may be used in the treatment of patients but that do not directly substitute for a malfunction in part of the human body do not qualify as medical appliances.” This illogical and overly restrictive regulation leads to the absurd interpretation of that statute by the [Department] that imposes a 1% tax on band-aids ... and a 6.25% tax on common medical appliances including scalpels, trocars or cannulas. (Footnote omitted). Very respectfully, there is no support whatsoever in the statute to authorize the Department to restrict “medical appliances” to only those items that “directly substitute for a malfunctioning body part”. It is an arbitrary restriction that the Department has no authority to impose, and the statutory

language affording “medical appliances” the benefit of the lower tax rate is clear on its face.

“An administrative agency ... has no inherent or common law powers, but is empowered to act only pursuant to the authority granted by law.” Sharp v. Board of Trustees of the State Employees Retirement System, ___ Ill. App. 3d ____ (4th Dist., January 13, 2014) citing Rossler v. Morton Grove Police Pension Board, 178 Ill. App. 3d 769, 773, 533 N.E. 2d 927, 930 (1989). Under the statute, the [Department] is required to impose only the 1% use tax and not the 6.25% use tax upon medical appliances. It has no authority to reduce the applicability of the 1% tax to a tiny subset of products as defined solely by the [Department].

Taxpayer’s Brief pp. 5, 6.

As is evident from the foregoing, the Taxpayer’s contention is that Regulation 130.311 which is cited by the Taxpayer in its brief, (and *ipso facto* virtually identical provisions of section 130.310(c)(2)), impermissibly imposes an additional restriction on the tax relief provided by section 105/3-10 and goes beyond the language in this statute. It is well settled that the Department’s regulations can neither limit nor extend the scope of a statute. See Canteen Corp. v. Department of Revenue, 123 Ill. 2d 95 (1988); DuMont Ventalating v. Department of Revenue, 73 Ill. 2d 243 (1978).

In Medcat Leasing Co. v. Whitley, 253 Ill. App. 3d 801 (4th Dist. 1993) the Illinois Appellate Court directly addresses the arguments the Taxpayer has raised. This case involved an attempt by a taxpayer to invalidate Regulation 130.310(c)(2), noted above, on the grounds that it impermissibly restricted the tax rate relief provisions of section 105/3-10 to appliances and devices “used as a substitute for any functioning part of the body.” As noted by the Appellate Court, the trial court in this case agreed with the taxpayer’s contentions. See Medcat Leasing Co., *supra* at 802 wherein the Appellate Court summarizes the circuit court’s determination as follows:

The trial court made the following findings: (1) the Department’s regulation implementing section 3 of the Act is invalid, to the extent it distinguishes between appliances correcting any functioning part of the body and those

assisting in the treatment and diagnosis of medical conditions, which distinction the legislature did not make by its use of the term “medical appliance” ...[.]

The Appellate Court overruled the circuit court and held that Regulation 130.310(c)(2) constitutes a valid and legally enforceable interpretation of section 105/3-10. Contrary to the Taxpayer’s arguments in the instant case, the Appellate Court held that: 1) the term “medical appliances” as used in section 105/3-10 is ambiguous because it is not defined, and 2) the Department’s regulation interpreting the term “medical appliances” as used in section 105/3-10 and limiting it to items “used as a substitute for any functioning part of the body” provides a reasonable construction of an ambiguous statute. The court accepted the Department’s definition of “medical appliances” pursuant to this regulation and stated that this regulation has the force and effect of law. In accordance with the court’s ruling in Medcat Leasing, the limitation of medical appliances qualifying for the low rate to items used as a substitute for a functioning part of the body constitutes a valid and legally enforceable limitation upon the types of apparatus and devices that can qualify for the low rate.

The Taxpayer cites legal precedent which it claims supports its argument that the Department’s regulations impermissibly limit the application of section 105/3-10 by restricting it in the aforementioned manner, namely the Illinois Appellate Court’s ruling in Travenol Laboratories, Inc. v. Johnson, 195 Ill. App. 3d 532 (1st Dist. 1990). Specifically, the Taxpayer argues as follows:

The instant case is similar to Travenol Laboratories, Inc. v. Johnson, 195 Ill. App. 3rd 532 ... (1st Dist. 1990). At that time the general high tax rate was five percent and the rate for “medical appliances” was zero. However, other than the rate differences in the statute and non-relevant differences in the regulation, the issues are the same.

Plaintiff Travenol Laboratories was a seller of kidney hemodialysis machines. Its products were not for consumer home use but for use by medical

professionals. Its sales, therefore, were to medical professionals and facilities, and not to consumers. The [Department] attempted to impose the high rate tax on Travenol's sales. [The Department] justified this tax by application of 86 Ill. Admin. Code section 130.311. At that time, the regulation read, in pertinent part:

(2) A medical appliance is an item which is intended by the maker to correct any functioning part of the body or which is used as a substitute for functioning part of the body such as artificial limbs, crutches, wheelchairs, ***and bandaids. ***

(3) Medical appliances used by health care professionals providing medical services do not qualify for the reduced rate of tax. (86 Ill. Admin. Code section 130.310(c) (2), (c) (3) (1985)).

Based upon the limitation of section 3 of the regulation, [the Department] imposed a high rate on Travenol's sales because its sales were to health care professionals who used Travenol's hemodialysis equipment in providing medical services. Travenol paid the tax under protest and appealed under the Administrative Review Law.

In contrasting the term "medical appliances ... for human use" under the Retail Occupancy (*sic*) Tax Act statute, and [the Department's regulation interpreting that language], the court in Travenol found the regulation to be invalid. As the statutory language of the ROTA and the Use Tax Act are identical, the court's analysis is directly relevant here.

[Quoting Travenol] The main issue before us is thus whether the Department's regulation is valid. Defendants argue it is valid because, like the pertinent [Retailers' Occupation Tax Act] provision, it merely limits the tax exemption to medical appliances used "for human use." Defendants further contend that the appliance is not sold for use by humans but rather that it is sold for a business use, i.e. use by healthcare professionals.

On the other hand, Travenol argues that the ROTA exemption provision does not distinguish between business and non-business use; the provision only limits exemption on the sale of medical appliances "for human use." Accordingly, Travenol asserts that the Department's regulation is nothing less than an improper rewriting of the ROTA exemption provision to include an additional qualification limiting application of the tax exemption where the product is sold to health-care professionals.

It is well settled that construction of a statute is a question of law. (internal citations omitted). The primary rule of statutory construction is to ascertain and effectuate legislative intent by looking first to the statutory

language itself. If the language is clear, the court must give it effect and should not look to extrinsic aids for construction. (internal citations omitted). We further observe that statutes are to be strictly construed in favor of the taxing body and against exemption. (internal citations omitted). Where a statute is ambiguous, courts should give substantial weight and deference to a reasonable construction of the statute by the agency charged with its enforcement (internal citations omitted); interpretations of statutes by an administrative agency are sources of legislative intent, although they are not binding on the courts (internal citations omitted).

In the present case, we find that the ROTA provision at issue is clear and unambiguous and we need not, as defendants argue, resort to extrinsic aids to determine the Legislature's intent. The Legislature plainly provided that "medical appliances... for human use" shall be taxed at the rate of 0%. Travenol's product is used for human ailments. Contrary to defendant's argument, the fact that the product is sold to health-care professionals, instead of directly to humans, simply does not change either the nature of the product (a medical appliance) or its use (for human use). Accordingly, the product specifically is a product exempted from taxation under the pertinent ROTA provision.

Were we to hold as defendants have urged, we would be impermissibly rewriting the subject statute words/provisions, as did the Department pursuant to its regulations that are not within the plain intention of the legislature. (internal citations omitted). The statute at issue provides that medical appliances "for human use" are exempt from the usual five percent tax; it does not provide that medical appliances "used by healthcare professionals" do not qualify for the reduced rate of tax. Clearly, had the Legislature intended to so provide, it could have, but did not, do so as it did relative to food sold for human consumption which is exempted, unless it is to be consumed off the premises where it is sold ... The legislature simply did not limit the exemption with respect to medical appliances by language distinguishing between medical appliances sold for business or nonbusiness uses or direct or indirect uses by humans. Travenol Laboratories v. Johnson, 195 Ill. App. 3d 532, 533-537 (1st Dist. 1990).

Taxpayer's Brief pp. 7, 8.

The aforementioned argument, based upon the ruling in Travenol Laboratories, was raised in Medcat Leasing, *supra* and expressly addressed by the Appellate Court in that case as follows:

Travenol is not of assistance to us because the case centered on the question of whether the exemption was conditioned on the "medical appliance" being sold directly to the patient. ... The litigants in Travenol had agreed that the components of a hemodialysis machine were "medical appliances"...[.] The component was held to be a "medical appliance" subject to the tax exemption, because it was for human use and consistent with the use as set forth in the statute.

Medcat Leasing, *supra* at 804.

As pointed out in Medcat Leasing, in Travenol, the Department conceded that the component at issue was a "medical appliance" as defined in subdivision (c)(2) of the Department's regulation 130.310. Thus, the only issue before the court was the validity of subdivision (3) of this regulation disqualifying "medical appliances" used by health care professionals from the tax relief the statute provided. Accordingly, Travenol does not address the validity of the Department's regulation 130.310(c)(2) defining "medical appliances" at issue in this case and is not in point.

In Medcat Leasing, the court refused to invalidate Regulation 130.310(c)(2) and expressly rejected the argument that this regulation's limitation of items eligible for tax relief as "medical appliances" to items substituting for malfunctioning parts of the human body is unlawful. In the instant case, the Taxpayer contends that the Department lacks the power to restrict "medical appliances" to which the 1% tax rate applies to items that substitute for malfunctioning parts of the human body because doing so unlawfully limits the scope of section 105/3-10. To the contrary, the Appellate Court clearly states in Medcat Leasing that the Department has lawfully and reasonably construed the ambiguous term "medical appliances" used in section 105/3-10 by limiting its application in this manner in Regulation 130.310(c)(2). Based upon the Appellate Court's ruling in Medcat Leasing, I find that Regulation 130.310(c)(2) and the substantially identical Regulation 130.311 are valid interpretations of the term "medical

appliances” as used in section 105/3-10 and that these regulations were lawfully applied by the Department in arriving at its audit determination at issue in this matter.

At the conclusion of its brief in this case, the Taxpayer also argues that even if regulations limiting “medical appliances” qualifying for the 1% tax rate are valid, they have been improperly applied by the Department in the instant case by including in items taxable at the higher rate various items the Taxpayer purchased for use in patient treatment that meet the criteria for taxation at the lower rate these regulations prescribe. Taxpayer’s Brief pp. 9, 10.

In an Exhibit labeled “Exhibit A” attached to the Taxpayer’s brief, the Taxpayer enumerates an extensive list of items it purchased that it claims were used in treating its patients. Taxpayer’s Brief, Ex. A. However, medical items used for the treatment of patients do not fall within the definition of the term “medical appliances” contained in Regulation 130.310(c)(2) and Regulation 130.311 because both of these regulations expressly state that “other medical tools ... that may be used in the treatment of patients but do not directly substitute for a malfunctioning part of the human body do not qualify as medical appliances.” The record in this case contains no indication of the manner in which any of the items listed on the extensive list of items the Taxpayer has enumerated substitute for functioning parts of the human body. Moreover, the stipulated record in this case, and the exhibits entered into the record with these stipulated facts, contain no evidence that any of the items the Taxpayer purchased for use in treating its patients substitute for malfunctioning human systems or body organs, which is the prerequisite for coming within the definition of “medical appliances” under the aforementioned regulations. As a consequence, the Taxpayer has failed to carry its burden to overcome the *prima facie*

correctness of the Department's classification of all of these items as taxable at the high rate. 35 ILCS 120/4 as incorporated by reference into the Use Tax Act at 35 ILCS 105/12.³

While section 105/3-10 at issue in this case does not completely exempt medical appliances from use tax, some medical appliances and other medical devices are completely exempt pursuant to section 105/3-5 of the Use Tax Act, 35 ILCS 105/3-5. The foregoing measure exempts "equipment used in the diagnosis, analysis, or treatment of hospital patients purchased by a lessor who leases the equipment, under a lease of one year or longer...to a hospital that has been issued an active tax exemption identification number...[.]" The record contains no indication that the Taxpayer is relying on this exemption, and the Taxpayer has produced no evidence demonstrating how or why it might apply to the facts presented in this matter. Consequently, I find that section 105/3-5 provides no basis for the Taxpayer to claim an exemption in the instant case.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notices of Tax Liability at issue in this case be affirmed.

Ted Sherrod
Administrative Law Judge

Date: July 16, 2015

³ The Taxpayer also contends that the Department has included in its schedule of items taxable at 6.25%, items it determined during the audit to be taxable at the 1% tax rate. Taxpayer's Brief pp. 9, 10. The Taxpayer's claim is supported by Taxpayer's Brief, Ex. A which asserts what the Taxpayer believes to be the correct tax rate on each item purchased but contains no references to corroborating books and records, such as specific items in the Department's audit workpapers, to support the Taxpayer's assertions. Since the assertions contained in the Taxpayer's Ex. A are not corroborated by any books and records, I find that Ex. A is insufficient evidence to rebut the Department's *prima facie* correct assessment determination. A.R. Barnes, supra; Central Furniture Mart, supra; Vitale, supra.