

**STREAMLINED SALES AND USE TAX AGREEMENT COMPLIANCE REVIEW
AND INTERPRETATIONS COMMITTEE**
Interpretive Opinion 2017-1

This Interpretive Opinion recommendation is made to the Governing Board by the Compliance Review and Interpretations Committee this 19th day of January 2017, in accordance with Article IX, Rule 902 of the Rules and Procedures adopted by the Streamlined Sales Tax Governing Board, Inc. Mr. Steven Clafin from Sovos Compliance requested the interpretation on November 16, 2016. A 60-day public comment period was provided and no comments were received.

Issue:

The issue is whether nasal strips meet the definition of prosthetic devices contained in the Streamlined Sales and Use Tax Agreement.

Background Provided by Mr. Clafin (Summarized):

Mr. Clafin's request describes the nasal strips as follows:

(From Breathe Right nasal strips website) Nasal strips are made of flexible, spring-like bands that fit right above the flare of the nostrils. The underside is adhesive so that once positioned on the nose, they stay there. As the bands attempt to straighten back to their original shape, they lift the sides of the nose and open the nasal passages.

This lifting action helps open inflamed sinus passages and makes it easier to breath. Nose strips provide relief for congestion due to colds, allergies, or a deviated septum and reduce snoring caused by nighttime nasal congestion.

Based on research documentation provided by Mr. Clafin, nasal strips generally are not treated as prosthetic devices in non-SST states. Some states, such as Colorado, say that nasal strips wouldn't fit their definition of a prosthetic device because they are not individually designed for a person. States that only exempt prosthetic devices sold pursuant to a prescription were out of the scope of this research as the nasal strips at issue are over-the-counter, non-prescription items. That research is summarized below:

SST States

A. Exempt – Qualifies as a Prosthetic Device

Iowa – Prosthetic devices without a prescription are exempt per Iowa Code § 423.3(60). There was no further guidance, but we received confirmation from the Iowa Department of Revenue that nasal strips are exempt as prosthetic devices.

Minnesota - Prosthetic devices without a prescription are exempt per Minn. Stat. §297A.67-7(a)(4). Sales Tax Fact Sheet 117D, distributed by Minnesota Department of Revenue, lists Breathe Right strips, a brand of nasal strips, amongst its examples of items exempt as prosthetic devices.

New Jersey - Prosthetic devices without a prescription are exempt per N.J.S.A. 54:32B-8.1. NJ Tax Bulletin TB63 lists Breathe Right strips, a brand of nasal strips, amongst its examples of items exempt as prosthetic devices.

Vermont - Prosthetic devices without a prescription are exempt per 32 Vt. Stat. Ann. §9741. There was no further guidance, but the Vermont Department of Taxes indicated that nasal strips are exempt as prosthetic devices.

B. Taxable – Does Not Qualify as a Prosthetic Device

Oklahoma - Prosthetic devices without a prescription are exempt per Okla. Stat. tit. 68, §1357(22). There was no further guidance, but Taxpayer Assistance indicated that nasal strips do not qualify as a prosthetic in Oklahoma nor are they otherwise exempt by statute.

Tennessee - Prosthetic devices without a prescription are exempt per Tenn. Code Ann. §67-6-320. There was no further guidance, but the Tennessee Department of Revenue indicated that nasal strips do not qualify as a prosthetic device in Tennessee nor are they otherwise exempt by statute.

Wisconsin - Prosthetic devices without a prescription are exempt per Wis. Stat. Ann. §77.54(22b). There was no further guidance, but the Wisconsin Department of Revenue indicated that nasal strips do not qualify as a prosthetic in Wisconsin nor are they otherwise exempt by statute based on a phone call to the Department. (Note: Wisconsin contacted Mr. Claflin on November 10, 2016, the date CRIC voted to accept the Interpretation Request, to indicate that Wisconsin has provided guidance that nasal strips qualify as exempt prosthetic devices.)

C. Taxable – “Individually Designed” Requirement

Kentucky – Exempts over-the-counter non-prescription prosthetic devices only if they are “individually designed or created for an individual.” Ky. Rev. Stat. Ann. §139.472(1)(g). Because nasal strips are not individually designed, they would not qualify for this exemption.

Washington - “Prosthetic devices” are only exempt when “prescribed, fitted, or furnished for an individual by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices, and the components of such prosthetic devices.” RCW 82.08.0283(1)(a). Because nasal strips are not individually designed, they would not qualify for this exemption.

D. Other

North Carolina – Exempts the sale of non-prescription prosthetic devices per NC. Gen. Stat. § 102-164.13(12). There was no further guidance available. Mr. Claflin discussed this with Eric Wayne who indicated that, since this is a defined term under the SSUTA, the decision as to whether or not these items qualify as prosthetic devices should be made by CRIC.

Non-SST states:

Illinois provides an exemption for medical appliances which are defined as items which are intended by their manufacturer for use in directly substituting for a malfunctioning part of the body. 11-0018-GIL held that nasal strips do not qualify for this exemption. Nasal strips did qualify for exemptions in Maryland (Md. Code, Tax Law § 11-211(a)(3)), New York (N.Y. Tax Law § 1115(a)(3)), and Pennsylvania (61 Pa. Code § 52.1). However, these are not prosthetic device exemptions, but were rather broad medical supply exemptions.

Public Comment: No written public comments were received. During the teleconference, Chad Paulson (MN) indicated that the treatment of nasal strips as a prosthetic device is a long-standing position under the definition. The state believes that nasal strips support a weak or deformed portion of the body. Scott Peterson (Avalara) pointed out that casts for broken bones do not touch the bone and whether the nasal strip comes in contact with the portion of the body it is supporting is irrelevant. Guy Childers (NV) commented that he had used nasal strips and that they were only a moderate help. He said that athletes use them to create greater air flow. He indicated that he did not believe that they supported a weak or deformed portion of the body. Ellen Thompson (NE) indicated that it was her understanding that when the definition of “prosthetic device” was developed the “weak and deformed” language was added to cover orthotic devices. Pat Calore (MI) asked if it would help to look at Medicare and Medicaid requirements, but after some discussion, the CRIC members decided the treatment under these programs is not relevant.

Recommendation:

By a vote of 3 to 2 of the members present, the Compliance Review and Interpretations Committee (CRIC) submits to the Governing Board a recommendation that definition of “prosthetic device” be interpreted to include nasal strips.

Rationale:

Appendix C of the Agreement defines “prosthetic device” to mean a replacement, corrective, or supportive device including repair and replacement parts for same worn on or in the body to:

- A. Artificially replace a missing portion of the body;
- B. Prevent or correct physical deformity or malfunction; or
- C. Support a weak or deformed portion of the body.

Nasal strips are affixed to the nose to pull open the nasal passages. There was general consensus that nasal strips do not replace a missing portion of the body, nor do they prevent or correct a physical deformity or malfunction. For example, in the case of a deviated septum, although the nasal strip may make it easier to breath, it does not prevent or correct the physical deformity or malfunction. Nasal strips support the nasal passages by pulling them open and therefore would meet the definition of “prosthetic device” under C. in that they support a weak or deformed portion of the body.

There was much discussion on the similarity to bandages such as butterfly bandages to hold a wound together. Bandages are listed under dressings as “not defined” in Appendix M. There was also a suggestion that CRIC request assistance from SLAC to research nasal strips in conjunction with a review of other items included in Appendix M prior to making a decision regarding nasal strips. In order to avoid a potential extended delay, the committee decided to make a recommendation, but to also survey states for further information to be presented to the Governing Board for consideration with the CRIC’s recommendation.

Participating Committee Members:

Voting Yes: Tim Jennrich, Dan Noble and David Steines; Voting No: Myles Vosberg and Ellen Thompson; Absent: Tom Atchley and Senator Wayne Harper

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