



STATE BOARD OF EQUALIZATION

916-324-3828

March 27, 1991

Dear X-----,

Your letter of February 8, 1991, has been referred to the Legal Division which I have been assigned the responsibility of answering to you. You have requested a ruling as to the applicability of California Sales and Use Tax to sales of products which your company, X----- (hereinafter X-----), purveys. We note that the Board Staff cannot issue tax rulings: only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a hypothetical set of facts.

I. FACTUAL BACKGROUND

You describe the general factual background of your request as follows:

“...Our Company designs, manufactures, and markets various surgical instruments, primarily related to two major surgical areas: wound closure and laparoscopic surgery. We are currently registered in all states which require sales tax registration and we are also qualified to do business in all states.

“...While the Company currently sells over 200 different items, there are several major functional categories within which such products generally fall.

“In most cases, the products ... are completely disposable. In certain, instances, however, the products are reusable.”

Your letter describes in greater detail the two major functional categories into which your products fall. These are discussed in detail below. Discussing each individual item, as you requested, would be extremely cumbersome. So, as California sales tax exemptions are arranged by category rather than by specific item, I will discuss the exemption as they apply to the functional categories you describe.

I. OPINION**A. Sales and Use Tax Generally**

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) “[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale...” (S 6091.) “Exemptions from taxation must be found in the statute.” (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 p.2d 201.)) “The taxpayer has the burden of showing that he clearly comes within the exemption.” Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765; 76~ [114' Cal.Rptr. 571].)

Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state unless otherwise exempted from taxation by statute. The use tax is supplemental to the sales tax, and, as such, is intended to supplement the latter by imposing upon those subject to it a tax burden equivalent to the sales tax in order that tangible personal property sold or utilized in this state would be taxable once for the support of the state government. (Bank of America v. State Board of Equalization (1962) 209 Cal.App.2d 780, 792 [26 Cal.Rptr. 348].)

B. Prescription Medicines

Section 6369, interpreted and implemented by Title 18, California Code of Regulations, Regulation 1591, provides that the sale of medicines, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(s).) The regulation goes on to specifically exclude from the definition of medicines items in the nature of instruments, apparatus, appliances, contrivances, devices, other equipment or articles, and the replacement parts thereof. (Reg. 1591(c)(2).) (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law). As a general rule, then, items used to apply medicine or treatment to the patient are not considered to be medicines.

Further excluded are items in the nature of bandages, compresses, supports, dressings, etc. (Reg. 1591(c)(2).) Sutures are, however, specifically included. (Reg. 1591(b)(2).)

You asked about application of the exemption in the veterinary context. The exemption only applies to sales of prescription medicine sold or furnished for the treatment of a human being. (Reg. 1591(8).) Sales to veterinarians are subject to tax. Veterinarians are considered to be consumers of, and so may not issue resale certificates to their suppliers for medicines and drugs which they use or furnish in the performance of their veterinary services (§§ 6018.1, 6092), but sell products to the general public at retail.

C. Tax Consequences to X-----

You asked about the taxability of the sales of products which fall into two major functional categories, products used in wound closure and products used in laparoscopic surgery.

You describe the first category as follows:

PRODUCTS USED IN WOUND CLOSURE

1. Products which are used to convey materials utilized in wound closure. This currently includes both disposable and non-disposable instruments which apply either surgical staples or clips, and may, prospectively include suture materials applied to internal or external tissues or bodily parts. Such products may consist of both a cartridge device housing, staples or clips and a delivery mechanism in the nature of a staple “gun” or clip applicator;
2. Products which consist of the wound closure material itself - that is, either surgical staples, clips or suture materials. Some of these materials are used internally and do not degrade within the body - such as metal clips, metal staples, or permanent suture materials. Others are absorbable and degrade after the wound is healed;
3. Products used to remove staples or sutures after the wound is healed, and

Regulation 1591 (2) provides that the term “medicine” includes “sutures”. We have previously determined that “sutures” means those items such as silk, thread, wire, or catgut used in the surgical uniting of two pieces of skin. We have also held in the past that disposable loading units, as well as, the disposable instruments and loading units (when sold together) that are used to join skin tissue also qualify as “sutures” under Regulation 1591(b)(2).

These products are exempt, however, only so long as they are used to close wounds, whether resulting from the injury itself or from surgery. When such products are primarily used in such procedures such as cutting or stopping the flow of blood during surgery, they are considered to be “appliances, etc.” Disposable staplers and staples qualify as “medicines” because they are sold as a unit. We have previously concluded that non-disposable staplers, not being sold as one with the staples, as well as staple removers, are also “appliance, etc.”, specifically excluded from the term “medicines” by Regulation 1591(c)(2) the sales of which are subject to tax.

Although my comments here refer generally to each category, I note that, as part of a previous audit of X-----, we have considered the taxability of the sales of two items which appear on page 21 of the price list you sent-the Surgiclip Disposable Clip Applicator, Models M-9.5 and M-11; and the Poly Surgiclip Disposable Automatic Clip Applicator. At that time, we concluded that the first item was used primarily curing surgical procedures, and so was considered a taxable “appliance, etc.”, but that the second

qualified as a “medicine” because it provided an absorbable or radio-transparent ligature. We reiterate those conclusions here.

You describe the second category as follows:

PRODUCTS USED IN LAPAROSCOPIC SURGERY

In laparoscopic surgery small incisions are made by use of trocars, which are surgical instruments used to create small punctures rather than larger linear incisions. Once the small punctures are created, tubes are inserted through which surgeons pass surgical instruments to perform the necessary surgical procedures. In laparoscopic surgery, surgeons insert lighting and camera devices in addition to the surgical instruments which are used to perform the surgical procedure. Laparoscopic surgery significantly reduces trauma and recovery time associated with other surgical techniques. Laparoscopic products consist of instruments which make incisions, provide portals through which other instruments pass; and which support the laparoscopic surgical procedures.

We have previously concluded that items which are used temporarily during surgical procedures are not “medicines”, but rather are “appliances, etc”. Since the products you describe are used only during laparoscopic surgery, to support the laparoscopic surgical procedures, we determine that they are items in the nature of “appliances, etc.” specifically excluded from “medicines” by Regulation 1591(c)(2). Sales of these items are therefore taxable.

For your Information, I have enclosed copies of Board of Equalization Pamphlets No. 45, ‘Hospitals’ (which contains a copy of Regulation 1591, among others, and No. 36, ‘Veterinarians’. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es