

**STATE BOARD OF EQUALIZATION**

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(916) 324-3828

January 14, 1992

Ms. C--- L---
Accounting Manager
H--- B--- Lab, Inc.
XX --- Drive, Suite XXX
---, California XXXXX

Re: SR -- XX-XXXXXX

Dear Ms. L---:

I am responding to your letter to me of December 3, 1991. You have asked whether sales or use tax applies to your company's sales of the Agee-Wristjack.

You indicated that you are currently paying sales tax and collecting tax reimbursement, or collecting use tax on the above product as a result of our opinion as expressed in a letter dated August 24, 1984, by Tax Counsel Charles J. Graziano. You further indicate that you have recently received from one of your clients a copy of a letter to its tax consultant, F--- & Associates, by Senior Tax Counsel Donald J. Hennessy, dated September 5 1985, indicating that your product qualifies as an orthotic device the sales of which are exempt from tax. You attached to your letter copies of both letters as well as a copy of a flyer describing the Agee-Wristjack.

The flyer states that the Agee-Wristjack is "designed to biomechanically compliment the anatomy of a fracture of the distal radius." It also contains a picture of the device showing it as one long piece of metal attached to the larger piece on the side facing the patient's hand. One end of the larger piece is attached to the distal end of the radius with surgical pins; the other is apparently attached to the thumb. The smaller piece is hinged and attached to the index finger with bone pins. The device is fully worn on the patient's body.

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...” (§ 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, 769 [114 Cal.Rprt. 571].)

B. Prescription Medicines

Section 6369 interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591 provides that sales 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(a).) Subdivision (b)(1) of Regulation 1591 defines “medicines” to “mean and include any substances or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use.” However, Regulation 1591(c)(2) adds that “medicines” do not include “articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical, or physical equipment or article or the component parts and accessories thereof.” (Regulations are Board promulgations that have the force and effect of law). As a general rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Regulation 1591(b) does provide that certain items, which might otherwise be considered as being devices, etc., are defined as “medicines”. Regulation 1591(b)(4) includes orthotic devices, or their replacement parts, designed to be worn on the person of the user as a brace, support, or other correction for the body structure.

C. Tax Consequences

Frankly, I am at a loss to understand your confusion. Mr. Graziano’s letter concerns a product called the “Metacarpophalangeal Joint Prosthesis” (“MJP”) and Mr. Hennessy’s discusses something called a “Zimmer Hoffman Type External Fixation System.” Both devices appear to provide a rigid structure which reduces a bone fracture and achieves alignment of the broken bone, the former being primarily for use on the human wrist. Both letters conclude that such devices qualify as orthoses under the above authority, and so, when sold or furnished under the requirements of Regulation 1591(a), their sales are exempt from tax. Your company should not be taxing the sales of either product.

The Agee-Wristjack appears to be similar in appearance to the MJP and perform much that same function. It also appears to be similar to the Colles’ Fracture Splint which your company sells and which was also the subject of a letter to Mrs. S--- A--- of your company by

Tax Counsel Charles J. Graziano dated January 10, 1984. Mr. Graziano concluded that such Splint qualified as an orthotic device under Regulation 1591(b)(4).

Similarly, the Agee-Wristjack appears to be designed to support the bone structure of the wrist and forearm while the radius fracture is healing. It appears to also provide for some up-and-down movement of the hand and fingers and some rotation around the radius and ulna. We thus conclude that this device qualifies under the above authority as an orthotic device. When sold or furnished under the conditions set forth in Regulation 1591(a), its sales are exempt from tax.

Sales of equipment used to install such devices are subject to tax, as indicated above. The flyer indicates that the Agee-Wristjack is sold in a kit with the installation equipment (screwdriver, wrench, drill guides, pin placement guide). If that is true, we follow the rule laid down in Mr. Hennessy's letter. If the kit is sold for a lump-sum price, tax applies to that price unless the sales price is allocated between the frame and pin components and the installation instruments contained in the kit. If the sales price is so allocated, sales tax is applicable only to the price charged for the installation instruments.

You have also requested information regarding the procedure to be followed in filing a claim for refund with the State Board. Revenue and Taxation Code Section 6904 provides:

“Every claim shall be in writing and shall state the specific grounds upon which the claim is grounded.”

Claims for refund for tax previously paid on sales of Agee-Wristjacks should be addressed to the Board of Equalization, Attention Audit Review and Refund Unit, P.O. Box 942879, Sacramento, California, 94279-0001.

For your information, I have enclosed a copy of Regulation 1591. 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

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Enclosure: Regulation 1591