

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

November 20, 1991

Mr. T. F. E---
Manager, State and Local Taxes
P--- I---, Inc.
XXX --- Road
---, --- XXXXX

RE: -- -- XX-XXXXXX

Dear Mr. E---:

The State Board of Equalization has asked its Legal Division to respond to your letter to it of October 4, 1991. I have been asked to prepare its response. You have requested an opinion on the applicability of sales and use tax to sales of medical diagnostic products generally, and to one product in particular which your company sells.

You state in your letter that P--- I---, Inc. (hereinafter "P---") sells products to California hospitals, doctors, clinical laboratories, and diagnostic centers which licensed medical personnel use to make diagnostic tests on their patients. You also attached a flyer of the specific diagnostic product in which you are interested, Magnevist, which describes the product as a "revolutionary contrast media for enhancing MRI [magnetic resonance imaging] images of the brain and spine." It indicates that Magnevist is a clear, colorless to slightly yellow solution which is injected into the patient in doses of up to 20 ml. The labels pictured in the advert state that Federal law prohibits dispensing the product without a prescription.

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.App3d 765, 769 [114 Cal.Rptr. 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.

C. Tax Consequences to P---

The facts indicate that Magnevist is injected into the patient to provide contrast to enhance MRI. We have previously concluded that, although diagnostic products generally do not qualify as "medicines" under the above definition, products which are intended for use by internal application to the human body in the diagnosis of disease do. (II Bus. Tax. L. Guide, Annot. 425.0580. Annotations are excerpts from previous Board staff opinion letters and serve as a guide to staff positions.) Thus we conclude that Magnevist qualifies as a medicine.

In order to qualify for the exemption, however, a product must not only be a "medicine" as defined in the regulation, it must also be sold or furnished in accordance with subdivision 1591(a). The facts do indicate that P---, besides making sales to doctors and hospitals, sells its products to clinical laboratories and diagnostic facilities. We assume that the latter establishments do not admit patients for stays of twenty-four hours or longer. Sales of prescription medicines to medical facilities which do not admit patients for stays of twenty-four hours or longer are not covered by the prescription medicines exemption. (Reg. 1591(g).) As a result, P---'s sales to doctors and to hospitals are exempt from tax; its sales to clinical laboratories and diagnostic centers are not.

As you can see from the above guidelines, whether or not sales of a product are exempt from tax as a prescription medicine depends on both the nature of the product and its use. The above rules will help you determine the taxability of P---'s sales of other products. If you need an opinion regarding a specific item, please send a description of the product and its use.

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

Enc.: Reg 1591