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June 14, 1994

BURTON W. OLIVER  
*Executive Director*

X-----

Re: X-----  
Spas

Dear X-----,

I am responding to your letter to the Legal Division dated May 17, 1994. You requested an opinion regarding the application of sales tax to your client's purchase of a spa upon a doctor's prescription.

You indicate that your client X----- bought a spa from X----- upon prescription of her doctor for use of the spa in therapy for her hip arthritis. You further indicate that, at the time she bought the spa, someone at the store told her that, with the prescription, no sales tax would be charged, but that the sales invoice shows that the store did collect tax reimbursement. When you contacted X----- they said they would need a letter from the Board stating that the transaction was not subject to tax in order to treat the sale as not subject to tax.

OPINION

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.) The retailer owes the tax but may collect the purchaser pursuant to agreement. (Civ. Code § 1656.1.) "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.)

Section 6369, interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591, provides that sales of medicine, 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) & (b) (1).) Under Regulation 1591(c) (2), "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." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

A "device" is "any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or any other similar or related article ... [i]ntended for use in the diagnosis of disease in humans or in any other animal." (Health & Safe Code § 26009(a) & (b).) The prescription was issued for X----- obtain the spa to mitigate her arthritis. Thus, the spa is a device under the Code. While there are exemptions for certain devices provided in Regulation 1591, none fit a spa. Therefore, under the above authority, sales tax did apply to this sale, and X----- was correct in paying tax and collecting tax reimbursement from X-----.

For your information, I have included 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

Enclosure: Reg. 1591