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**STATE BOARD OF EQUALIZATION**

April 19, 1996

Orthotics & Prosthetics

Dear

I am responding to your letter dated February 9, 1996, to Assistant Chief Counsel Gary J. Jugum. You ask for advice regarding billing for your sales of orthotic and prosthetic equipment in California. You describe your operation as follows:

“--- Orthotics and Prosthetics West Inc., hereafter referred to as ---, is primarily in the business of providing orthotic and prosthetic devices which are custom fit by our licensed professionals to meet the needs of each individual patient. Currently, all sales are made under a prescription from the patients physician. An orthotic or prosthetic device can not be fitted and/or sold to patients with a prescription from their physician.”

You are not asking about the taxability of the products NovaCare sells but rather about billing your charges for such equipment.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes a sales 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 noted, all statutory references are to the Revenue and Taxation Code.) A "retailer" is one who engages in the business of making retail sales of tangible personal property. (§ 6015(a).) A "retail sale" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (§6007.) The definition of "gross receipts" includes the "cost of the material used, labor or service cost, interest paid, losses or any other expense." (§ 6012 (a) (2).) The total amount of the sale price includes any services that are a part of the sale. (§ 6012 (b) (1).)

B. Tax Consequences.

1. “Since our direct materials and direct labor charges are co-mingled for acceptance by Medicare/Medicaid and private insurance carriers, and our direct material costs

equal or slightly exceed direct labor costs, are we properly considering ourselves a retailer of customized orthotic and prosthetics, and not a service provider?"

--- is the retailer of the devices it sells under the above authority since it is in the business of selling tangible personal property at retail. Its fitting services are part of the sale and so charges therefor must be included in the gross receipts derived therefrom.

2. "Since the patient is referred to us by their doctor, on a prescription basis, and we sometimes directly bill the prescribing medical provider, or the patients' insurance provider, are we permitted to sell our products exempt from sales tax, provided we obtain a proper resale or exemption certificate from the medical provider or insurance carrier?"

The fact that the patient is reimbursed by a medical insurance carrier does not alter the application of tax. (Reg. 1591(n).) If the sale of the product is exempt from tax, --- should obtain from the purchaser an exemption certificate conforming to the requirements of Regulation 1667 and retain it in its own records to support the exemption. (Reg. 1591 (p).)

3. "If a patient is a Medicare/Medicaid recipient, and we bill Medicare directly, is this sale considered an exempt transaction, as a sale to the federal government? If so, what documentation would be required."

It depends. If the sale is under Medicare A, that is a sale directly to the United States and so exempt from tax. (§ 6381.) If, however, the patient is reimbursed under Medicare B, that is a sale to the patient, and the normal taxation rules apply to determine if the sale was subject to tax. Regulation 1591(p) requires that you maintain the proper records to support the exemption. You should contact the Board office which issued NovaCare it seller's permit, and which would be auditing it, to discuss documentation. As you surmised in your letter, the result is the same whether you bill Medicare itself or a regional carrier.

For your information, I have included copies of Regulations 1591 and 1667. 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  
Senior Staff Counsel

JLW:sr  
Enclosures: Regs. 1591 & 1667  
cc: District Administrator