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April 13, 1994

Ms. T--- A. C---
Accountant
A--- I---, Inc.
P.O. Box XXXXX
XXXX --- Road
---, --- XXXXX

Re: SR – XX-XXXXXX
Catheters

Dear Ms. C---:

I am responding to your letter of February 22, 1994 to the Legal division requesting an opinion with regard to the application of sales and use tax to sales by your company ("A---"). You describe A---'s operations as follows:

"A--- develops, manufactures and markets a great range of clinically advanced, disposable catheters and related products. The Company's products are used primarily in critical care procedures by anesthesiologists, critical care specialists, surgeons, cardiologists and emergency and trauma physicians. The critical care products are used principally for central vascular access for administration of fluids, drugs, and blood products, patient monitoring and diagnostic purposes, as well as for pain management. A--- also produces a line of vascular interventional procedure products used by cardiologists and interventional radiologists for such purposes and the diagnosis of heart and vascular disease."

You attached copies of a sample list of A---'s products and their content, a copy of Annotation 425.0230 faxed to you on December 31, 1993, by Ms. Carol Jaffe of the Board's San Francisco District office; a copy of a letter to a Mr. J--- R---, presumably of your company, from Ms. P--- L. C---, dated February 25, 1991, Chief Accountant of P--- V--- Hospital, in which she states that the products her hospital purchases are exempt from tax by reason of Revenue and Taxation Code Section 6369 "which states that catheter used as a result of an artificial opening created in the human body shall be deemed to be dispensed upon prescription" (unless otherwise stated, all statutory references are to the Revenue and Taxation Code); and a copy of Tax Tip

Pamphlet No. 45 which you apparently received from The H--- Group, representing The C--- H--- of the M--- P---

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, 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. "[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. St. Bd. of Equalization (1974) 39 Cal.App.3d 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 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).) Subdivision(b)(1) defines "medicine" to "mean and include any substance 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." (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.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as "medicines." Sub-division (b)(2) included articles permanently implanted in the human body to assist the functioning of any natural organ, artery, vein or limb and which remain or dissolve in the body. Regulation 1591(b)(4) includes orthotic devices, or their replacements, designed to be worn on the person of the user as a brace, support, or other correction for the body structure. Regulation 1591(b)(5) includes prosthetic devices and their replacement parts designed to be worn on or in the person of the user to replace or assist in the functioning of a natural part of the human body. Regulation 1591(j) includes any appliances and related supplies necessary as a result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste.

Therefore, all catheters are taxable with three exceptions: (1) catheters which are permanently implanted are exempt under Regulation 1591(b)(2); (2) catheters which are used for drainage purposes through artificial openings are exempt under Regulation 1591(j); and (3) catheters or other types of drainage devices used for drainage through natural openings are exempt under sub-division (b)(5). To be exempt, their use must be post-surgery. Sales of catheters used for diagnostic purposes, irrigation, feeding, and administration are subject to tax. (Annot. 425.0230.)

C. Tax Consequences to A---.

First of all, the letter from P--- V--- Hospital contains incorrect advice. Only catheters used for elimination of natural waste as a result of an artificial opening in the body are deemed to be dispensed on prescription under Regulation 1591(j), not just any catheter so used.

The list of products which you sent is too voluminous for me to give a definitive opinion on each one. I can, however, discuss the application of tax to sales of catheters generally. The statement of law found in Annotation 425.0230 is correct. For their sales to be exempt from tax, catheters must be used in one of the three ways set forth in the annotation. Otherwise, they are excluded from the term "medicines" per Regulation 1591(c)(2).

You describe A---'s products as being used primarily for diagnostic purposes, and for administration of fluids, drugs and blood products, and for patient monitoring, as well as for pain management. Such uses do not come within the exemptions outlined in the annotation. A---'s products are thus appliances or devices excluded from the terms "medicines" under Regulation 1591(c)(2). Assuming none of these catheters are permanently implanted, their sales are subject to tax.

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

cc: Ms. Carol Jaffe, San Francisco District

A---.ltr