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November 4, 1993

X-----

Re: X-----

Dear X-----,

I am answering your letter to me of September 14, 1993. You indicate that X----- is a wholesale dealer of medical surgical supplies and equipment. You ask about the application of sales or use tax to its sales of the above items in California.

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.) It 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 PO.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." Regulation 1591(b) (2) provides that article

permanently implanter in the human body to assist the functioning of, as opposed to replacing all or any part of, any natural organ, artery, vein, or limb, and which remain or dissolve in the body are included in the definition of "medicines."

C. Tax Consequences.

1. Keri Lotion.

You ask this question on behalf of X----- Medical Center, which you indicate has been told by its tax consultant that sales to it of Keri Lotion are exempt from tax because the lotion is specifically used for the treatment of dry and irritated skin, and it is absorbed into the body. I cannot, unfortunately, give you a definitive answer. If sold to the Medical Center for the treatment of a patient for skin disorders pursuant to the order of a licensed physician, Keri Lotion would be considered a medicine. If sold, however, for use in relieving dryness and irritation of patients' and employees' skin occurring as a result of normal hospital operations such as use of rest rooms, cleaning the facilities, etc., it would not.

2. Interceed Barrier.

I indicate that your query on this item came from X----- Hospital. You describe the function of the Interceed Barrier as follows:

"It is a sterile knitted fabric prepared by the controlled oxidation of regenerated cellulose. It reduces adhesion formation in gynecological pelvic surgery by being applied dry to traumatized surfaces after meticulous hemostasis consistent with microsurgical principles to physically separate apposing tissue surfaces during the period of reperitonealization. The Interceed Barrier is absorbed from the site of implantation within four weeks. The absorption rate depends upon several factors including the amount used and implantation site. The Interceed Barrier is chemically composed of oxidized regenerated cellulose which has been shown not to enhance bacterial growth. The Interceed Barrier is indicated as an adjuvant in gynecological pelvic surgery for reducing the incidence of postoperative pelvic adhesions after hemostasis is achieved consistent with microsurgical principles..."

Briefly then, the Interceed Barrier is apparently a surgical fabric used to enclose the viscera while the peritoneum repairs itself after pelvic surgery. It is implanted in, and absorbed by, the body.

As the Interceed Barrier is implanted and dissolves in the body of the patient, it is defined as a "medicine" by Regulation 1591(b) (2). It may only be sold or furnished pursuant to Regulation 1591(a). Therefore, its sales are exempt from tax.

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