

**STATE BOARD OF EQUALIZATION**

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April 30, 1991

Mr. J--- -, B---
PQR. Medical Supply
XXX --- Court, Unit #XX
--- ---, CA XXXXX

Dear Mr. B---:

Your letter of March 7, 1991, to the California State Board of Equalization has been referred to the Legal Division, which has assigned it to me for a response. You have requested, at the suggestion of the --- --- office, clarification and interpretation of the Sales and Use Tax Law as it applies to items which your company, PQR Medical Supply (hereinafter "PQR"), sells to resale businesses and health facilities. Your letter includes a list of the items in which you are interested.

I. 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) 29 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Prescription Medicines.

Section 6369 interpreted and implemented by Title 28, California Code of Regulation, 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. Catheters

Sales of catheters are generally taxable, with three major exceptions: (1) catheters which are permanently implanted are exempted under section 6369(c)(2); (2) catheters which are used for drainage purposes through artificial openings are non-taxable under section 6369(g) dealing with ostomy materials (this exemption includes supplies); and (3) catheters or other types of drainage devices used for drainage through natural openings are non-taxable as prosthetic devices under section 6369(c)(4). Catheters may also be exempted if they are an integral and necessary part of another exempt item.

D. Tax Consequences to PQR

Whether or not items of tangible personal property qualify as “prescription medicines” often depends upon how they are used in the treatment of a human being. Unfortunately, you do not supply any particulars about the function of the items you listed. As a result, I cannot give you a definitive opinion on the sales of several of these products. Some general comments are possible, however.

Please note that items which PQR sells to entities which will resell them are not subject to tax because sales for resale are excluded from sales tax. (§ 6007.) A buyer may purchase the items free of tax by submitting a resale certificate substantially conforming to the requirements of Regulation 1668. Sales of medicines are exempt from tax when they are sold or furnished under the conditions set forth in Regulation 1591(a). Sales of items sold over the counter to the general public not at the order of a physician are subject to tax.

1. Alcohol (Isoprobyl, 70%, Isopropyl, 99%). I assume that the 70% alcohol is that product commonly known as “rubbing alcohol”. We have previously concluded that rubbing alcohol is a “medicine” the sales of which are exempt under Regulation 1591. (II. Bus. Tax. L. Guide, Annot. 425.0780. Annotations are excerpts from previous Board staff opinion letters and serve as a guide to staff positions.) If the 99% alcohol product is used for the treatment of a human being and is sold or furnished under the conditions set forth above, it also qualifies as a “medicine”.

2. Alcohol Prep Pads, Providine-Iodine Cleanser Prep Pads; Iodine Swabsticks; Dressings Containing a Control Gel Formula. We have previously concluded that the Board of Equalization did not intend to include bandages and dressings impregnated with medicine for the purpose of medicating when it excluded “bandages and dressings” from the definition of the term “medicine” in Regulation 1591(b)(2). Therefore, we consider that the alcohol and iodine-impregnated pads and swabs, used to disinfect the wounds, qualify as “medicines”. Unfortunately, we do not have enough information about the “control gel formula” to determine its qualification as a medicine. If the gel medicates the wound, the dressing qualifies, but if the gel merely imparts certain characteristics to the bandage itself, such as to prevent it from sticking to the wound, it does not qualify.

3. Acetic Acid, 25% Irrigation Solution; Sodium Chloride Solution, 0.9% Irrigation; Sterile Water Solution, Irrigation; Sterile Water Solution, IV Injection; Dextrose Solutions, Injection. We have previously determined that intravenous and irrigation solutions and solutions to be injected constitute medicines. (II. Bus. Tax. L. Guide, Annot.425.0480.)

4. TB Syringes. In general, syringes do not qualify as a “medicine” under Regulation 1591 despite the fact that a doctor may have prescribed their use. However, if the syringe is sold with the medicine inside, it qualifies as a container sold with tax-exempt contents under Regulation 1589(b)(1)(C). Therefore, subject to the above condition, tax applies to the sales of TB syringes.

5. Suction Catheters. You do not provide any particulars about the form and function of these items. As a general class, suction catheters are often hand held, are attached to a wall mounted suction system, may have a regulating thumb n-hold for adjusting suction pressure and continuity, and are not worn on the person. They therefore do not qualify as “medicines” under the above statutes. Sales of non-specific suction catheters are taxable.

For your information, I have enclosed a copy of Pamphlet No. 45, “Hospitals”, and Regulation 1589. I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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