



STATE BOARD OF EQUALIZATION

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November 9, 1992

BURTON W. OLIVER
Executive Director

Ms. --- ---
Financial Accounting Manager
--- --- -. -. --- Center
--- --- ---
---, California 9XXXX

Re: [No Permit Number]
Sales of Radiopharmaceuticals

Dear Ms. ---:

I am responding to your letter dated September 23, 1992. You asked for a written opinion regarding the application of sales and use tax to sales of radiopharmaceutical by your company ("ABC").

I. FACTUAL BACKGROUND

You attached to your letter a copy of the statement that was submitted to the Franchise Tax Board in support of ABC's application for exemption. According to the statement, ABC was formed by two [---] hospitals to operate a diagnostic imaging center using positron emission tomography ("P.E.T."). It employs a nuclear imaging device to evaluate biochemical and metabolic processes throughout the body. At this time, ABC will be operating the only P.E.T. scanner in Northern California.

ABC is also purchasing a cyclotron to manufacture the radiopharmaceutical used to operate the P.E.T. scanner. It anticipates that its activities will consume about one-third of the radiopharmaceutical which the cyclotron will product. You indicate that ABC expects to sell the remainder to other P.E.T. imaging centers throughout the Western United States.

II. 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. 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.

Sales of medicines are exempt from tax when they are furnished by a health facility for treatment of any person pursuant to the order of a licensed physician, dentist, or podiatrist. (Reg. 1591(a)(3).) “Health facility” means ‘any facility, place, or building which is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer, ...’” (Reg. 1591(g).)

C. Tax Consequences to ABC.

Pursuant to the above authority, then, the tax consequences of ABC's sales of excess radiopharmaceutical depend upon how those products are used. We have previously concluded that these products qualify as medicines only when they must be taken internally by or applied externally to the person of the patient in order to be used in the scanning process. (Annot. 425.0560. Sales and Use Tax Annotations are excerpts from previous Board staff opinion letters and serve as a guide to staff positions.) Otherwise, sales of such items are subject to tax.

If ABC sells radiopharmaceuticals which qualify as medicines under the above authority to hospitals for treatment of a human being, those sales are exempt under Regulation 1591(b)(3). If, however, ABC sells to a facility which does not qualify as a "health facility" under Regulation 1591(g), then the sale is subject to tax.

You ask about the tax consequences if, assuming sales of such products are subject to tax, the buyer is located outside of California or is, as you put it in your letter, "located in a region with a higher rate of sales tax." By the latter phrase, I assume you are asking about the rate to be applied when ABC ships these products to a diagnostic center located in a county that has a higher county-wide tax rate than [---] County.

When ABC sells these products to out-of-state purchasers and, pursuant to the contract of sale, is required to ship, and does ship, the property to a point outside this state, either by its own facilities or by delivering it to a carrier, customs broker, or forwarding agent for shipment to such out-of-state point, the sale is exempt from tax under Section 6396. When it sells to customers located outside of [---] County, which has one countywide taxing district, the tax rate depends on the rate in effect in the county of destination and whether or not ABC is "engaged in business" for tax purposes in that county. (Reg. 1823(b)(1)(E).) It is "engaged in business in the county of destination when it makes deliveries into that county by means of its own facilities or when it has representatives there who participated in the sale. (Reg. 1827(c).)

If ABC ships to a county that does not have a countywide taxing district, only the statewide rate of 7.25% applies. Please note that if Proposition 167 passes, the statewide rate will be lowered to 7%. If it ships to a county with two or more such districts, the purchaser will owe district use tax at the rate in effect in the county of use- presumably the county where the goods are sent. If ABC is engaged in business as defined above in that county, it must collect the district use tax at the rate in effect therein. If it is not, the sale is subject only to the statewide rate.

For your information, I have included a copy of Board of Equalization Pamphlet No. 44, which includes Regulations 1823 and 1827, and 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

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Encs.: Pamphlet 44
Reg. 1591