

**STATE BOARD OF EQUALIZATION**

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Executive Director

March 2, 1995

RE: ---

Dear ---:

I am responding to your letter to the Legal Division dated January 11, 1995 regarding the applicability of sales or use tax to certain medical products your company sells. You indicate that X is a manufacturer and distributor of healthcare products. You describe the products at issue as follows:

"As part of our product line, we manufacture the --- Compression System/--- Impulse and --- anti-embolism stockings. These products are designed to increase blood velocity and reduce the incidence of DVT (Deep Vein Thrombosis). These products can be used preoperatively, intraoperatively, in the recovery room, ICU, or the patient's room. Additionally, the A-V Impulse System can be purchased by the patient for use at home."

You ask for a determination as to the taxability of the sales of certain elements of these systems. You also attached brochures describing these products.

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.) Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible

personal property purchased from any retailer for use, storage, or other consumption in this state unless otherwise exempted from taxation by statute. The use tax is intended to supplement the sales tax by imposing upon those subject to it a tax burden equivalent to the sales tax in order that tangible personal property sold or utilized in this state would be taxable once for the support of the state government. (Bank of America v. St. Bd. of Equalization (1962) 209 Cal.App.2d 780, 792 [26 Cal.Rptr. 348].)

Please note that the sales tax is imposed upon the retailer for the privilege of selling tangible personal property in this state while the use tax is upon the purchaser who uses, stores, or otherwise consumes such property here. Pursuant to agreement, the purchaser may reimburse the retailer for its sales taxes paid (Civ. Code 1656.1), but the retailer must collect the use tax from the purchaser if engaged in business in this state. (Ibid. at 792-793; § 6303.)

"[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.O.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)(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.

C. Tax Consequences to X.

1. Anti-Embolism Stockings. We have previously determined that these items normally qualify as prosthetic devices under Regulation 1591(a)(5) because they are worn on the patient and can operate separately from the compression system. If, however, they may only be worn when compression therapy is being applied, it is a part of the machine. As a result, their sales are exempt from tax unless they are considered part of the machine, in which case, for reasons expressed below, their sales would be taxable.

2. --- Controller, --- Sleeve, --- Tubing, --- Impulse System Foot Pump, Impad Undercase Inflation Pad, Impad Rigid Foot Cover.

The --- Compression System and the --- Impulse System both appear, from the information provided in the brochure, to operate the same way. A compression sleeve is placed on the affected limb. The sleeve is connected by means of tubing to a pump which rests on a table beside the patient and administers the compression therapy treatment. We have previously determined that such systems do not qualify as prosthetic devices. First of all, they are not worn on the patient. Rather, the pump sits on a table next to where the patient is laying or sitting, and the patient is not ambulatory during treatment. Second, these systems do not assist a part of the body in its natural function but prevent a medical condition--the formation of emboli. Such systems thus do not qualify as medicines but are considered devices, etc., excluded from the definition of medicines under Regulation 1591(c)(2). Sales of such systems are subject to 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:sr
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Enclosure: Reg. 1591

cc: --- District Administrator