



STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)

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October 6, 1993

BURTON W. OLIVER
Executive Director

Mr. J--- P---, State Tax Manager
Ms. D--- L. T---, Tax Assistant
C. R. B---, Inc.
XXX --- ---
--- ---, New Jersey XXXXX

Re: SS OH XX-XXXXXX
Misc. Medical Items.

Dear Mr. P--- and Ms. T---:

I am responding to your letter to the Legal Division dated August 27, 1993. You requested information regarding the applicability of the California Sales and Use Tax Law to B---'s sales of certain medical items. You attached lists of your various products. The list is too voluminous for me to give you an opinion on each one, but I can discuss them by the categories you set forth. You indicate that the goods are shipped from your offices in New Jersey, so the applicable tax is the use tax.

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 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)(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.

C. Tax Consequences.

1. Definitions. You ask for definitions of certain terms. I have attached a copy of Regulation 1591 for your ease of reference. (Sales and Use Tax Regulations are promulgated by the Board to aid in the enforcement and administration of the Sales and Use Tax Law and have the force and effect of law.) "Medicines" are defined in sub-divisions (b) and (c). For the sale of tangible personal property to be exempt as a prescription medicine, the item must be a "medicine" as defined in those sub-divisions and be sold or furnished pursuant to sub-division (a). "Prescription" is defined in sub-division (e). The term "bodily functions" does not appear in the California Sales and Use Tax Law.

2. Implants. You ask how long an implanted device must be in place to be exempt under Regulation 1591(b)(2). We have previously concluded that, to be considered "permanently implanted," the item must be implanted with the intent that it remain in place for at least six months - i.e., the item was intended to be "permanently" implanted even if for some reason it had to be removed sooner.

3. The phrase "takes over a bodily function" does not occur in the California Sales and Use Tax Law.

4. Kits. You ask what happens when taxable and exempt items are sold together in a kit. Annotation 425.0510 sets forth the rule to be applied in this situation as follows:

"Tax applies to the entire sales price of medical kits, dispensed by prescription only ... if the kit is sold for a lump sum price. If the price of the kit is separated between taxable and nontaxable items, tax is applicable only on the price charged for the taxable items."

(Sales and Use Tax Annotations are excerpts from previous Legal staff opinion letters and serve as a guide to staff positions.)

5. Is the taxability of a product determined by whether it is "disposable" or "reusable?"
Not usually. Need specifics on the product involved.

6. Catheters. Annotation 425.0230:

"Catheters are generally taxable, with three major exceptions:

"(1) catheters which are permanently implanted are exempted under [Regulation 1591(b)(2)];

"(2) catheters which are used for drainage purposes through artificial openings are non-taxable under [Regulation 1591(j)] dealing with ostomy materials (this exemption includes supplies); and

"(3) catheters or other types of drainage devices used for drainage through natural openings as prosthetic devices [as a result of surgery] under [Regulation 1591(b)(5)].

"Catheters may also be exempt if they are a necessary and integral part of another exempt item."

7. Oxygenators and Related Supplies. Regulation 1591(m) requires that, for the medical oxygen delivery system exemption to apply, the system must be sold to an individual for the personal use of that individual as directed by a physician. As a result, sales to medical facilities for their use are subject to tax, but sales for resale would be excluded from tax. (Reg. 1668.) Items included within this exemption are liquid oxygen containers, high pressure cylinders, regulators, oxygen concentrators, tubes, masks and related items necessary for the delivery of the oxygen to the person. The items you list under "Oxygenators and Related" appear to be used temporarily during surgery by hospital personnel and so do not come within the exemption.

8. Trays are generally taxable unless they are a related supply to another exempt item.

9. Urinary Bags and Meters. Urinary bags are necessary and integral to the operation of a urinary catheter and so are exempt along with the catheter under either Regulation 16591(b)(5) or (g). The meters appear to be used during treatment and so are a device under sub-division (c)(2) the sales of which are taxable.

10. Laparoscopy. We have previously concluded that items used temporarily during laparoscopic surgery are devices, appliances, etc., excluded from the definition of "medicines" by Regulation 1591(c)(2) with the result that sales of such items are subject to tax.

11. Grafts and Fabric and Wound Management. Items you describe as "grafts" appear to be permanently implanted. If so, their sales are exempt under Regulation 1591(b)(2). Bandages and dressings are excluded from the definition of "medicines" under Regulation 1591(c)(2) with the result that sales of such items are subject to tax. Dressings impregnated with medicines are excepted from that exclusion; surgical fabric that remains in and is absorbed by the body is exempt under sub-division (b)(2).

12. Skin Care. Sales of incontinence products are exempt only if the use of the product is made necessary due to an ostomy operation.

Your other categories are far too general for me to render an opinion on them. If you have further questions about specific products, please write, describing the function and transference method of each.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Enclosure: Reg. 1591