



STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
 (P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
 (916) 445-6450

WILLIAM K. BENNETT
 First District, Kentfield

BRAD SHERMAN
 Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
 Third District, San Diego

MATTHEW K. FONG
 Fourth District, Los Angeles

GRAY DAVIS
 Controller, Sacramento

BURTON W. OLIVER
 Executive Director

August 24, 1992

Re: X-----
 Incontinence Creams and Washes

Dear X-----,

I am responding to your follow-up letter dated July 15, 1992, to mine to you dated June 16, 1992, on the above topic. You indicate that it would be easier for providers and the Department of Health to administer reimbursement for purchases of these items under the Medi-Cal program for them to be considered exempt medicines no matter who sells them - registered pharmacy or any provider. You urge the Legal Division to adopt this interpretation.

We do appreciate your problem. Perhaps it would be easier on everyone if we could make such a decision. Unfortunately, such is not the law. As I pointed out in my previous letter, sales of medicines are exempt only if they are sold or furnished in one of the ways required by Regulation 1591(a). Medicines sold directly to patients must be dispensed on prescription filled by a registered pharmacist in accordance with law for such sales to be exempt from sales and use tax. (Reg. 1591(a) (1).) Regulation 1591(j) implements a special statutory exemption for ostomy supplies, deeming sales of such items to be by a registered pharmacist. Incontinence supplies were not included in this exemption.

"It is true that the Legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for carrying into effect the expressed purpose of a statute even though such rules include the authorization to exercise discretion in doing so, provided that discretion is not purely arbitrary and does not amount to a sanction to add to or change the statute or confer upon the board a right to determine what the law shall be in a particular case." (Am. Distilling Co. v. St. Bd. of Equalization (1942) 55 Cal.App.2d 799, 805 [131 P.2d 609].) "Administrative agencies 'may not exercise [their] sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered. Administrative regulations in conflict with the Constitution or statutes are generally declared to be null or void [citations].'" Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 426 [128 Cal.Rptr. 183, 546 P.2d 687], quoting from Harris v. A.B.C. Appeals Bd. (1964) 228 Cal.App.2d 1, 6 [39 Cal.Rptr. 192]; Am. Distilling, supra.)

Thus, the Board is constrained by the language of the statute in interpreting and implementing exemptions. The fact that the legislature broadened the exemption in the case of ostomy supplies only is a strong indication that the exemption in the case of incontinent supplies is narrower. Therefore, we must adhere to our previous opinion. Sales of incontinence supplies to patients are exempt if dispensed by a prescription filled by a registered pharmacist in accordance with law. Any change must be made by the Legislature.

If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

Cc: Irvin Chanin
Calif. Dept. of Health Services
Rate Development Branch
714 P St., Rm. 1550
Sacramento, CA 95814

Bc: Van Nuys District Administrator



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October 8, 1992

Re: X-----
 Skin Care Products

I have received your letter to me dated July 24, 1992, following up on mine to you dated May 8, 1992. Your company is apparently involved in an argument with the State Department of Health Services regarding the application of tax to its sales of creams and washes sold to incontinency patient versus those sold to ostomy patients.

You indicated that your understanding was that both products must, in order to qualify for an exemption from sales or use tax as a prescription medicine, be sold to patients pursuant to a doctor's prescription." In addition, a prescription for creams and washes sold to incontinency patients must be filled by a registered pharmacist pursuant to law while one for such products sold to ostomy patients may be sold by a medical supply vendor i.e., a supplier that is not a pharmacy. You also indicated that Health Services considers such products sold to incontinency patients as exempt from tax and asked if there is a special exemption for such products sold by a private provider for use by Medi-Cal beneficiaries.

OPINION

The short answer to your question is that there is not. The normal rules of sales and use taxation determine the application of tax to sales of medicines to Medi-Cal patients. Your understanding of the taxation of sales of the above products to Medi-Cal patients is correct.

Other companies have written the Legal Division about this problem as has the department itself. Our answer has been the same each time.

As you understand, we have no control over the Department of Health Services. However, as you requested, I am sending a copy of this letter to the Rate Development Department at Health Services.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Cc: Irvin Chanin
Calif. Dept. of Health Services
Rate Development Branch
714 P St., Rm. 1550
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Bc: Van Nuys District Administrator