

**STATE BOARD OF EQUALIZATION**

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March 28, 1991

Mr. G--- B---
Controller, M---
XXX --- ---
--- ---, California XXXXX

Re: SR -- XX-XXXXXX

Dear Mr. B---:

Your letter of February 6, 1991, to the Legal Division has been referred to me for a response. You have requested advice regarding the proper sales and use tax treatment of sales of vitamins, minerals, and dietary food supplements to chiropractors, licensed acupuncturists, licensed nutritionists, and massage therapists (hereinafter generally "such practitioners"). You appear to be particularly concerned about when your company may accept resale certificates from such practitioners in order to properly sell its products to them free of 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 noted, all statutory references are to the Revenue and Taxation Code.) A "retailer" is one who engages in the business of making retail sales of tangible personal property. (§ 6015(a).) "A retail sale is one made for any purpose other than resale in the regular course of business in the form of tangible personal property. (§ 6007.) "[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 at retail is upon the person who makes the sale. . ." (§ 6091.) The retailer owes the sales tax, but it may collect sales tax reimbursement from the purchaser pursuant to agreement. (Civ. Code § 1656.1.)

A retailer making a purchase for resale may issue a resale certificate (§ 6066) which conforms substantially to the requirements of Title 18, California Code of Regulation, Regulation 1668. (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

A. Chiropractors

Under the general scheme, where a sales transaction involves intermediate sellers who buy and resell the product, sales tax is due only upon the sale to the ultimate consumer (here, the patient). Any intermediate sales are treated as sales for resale, and so not includable in the measure of sales tax. (§§ 6007; 6091.) The legislature has, however, altered that scheme with regard to chiropractors. A chiropractor who uses or furnishes vitamins, minerals, dietary supplements, and orthotic devices in the performance of professional services is treated as the consumer thereof and not the retailer. (§6018.4.)

Previous Board Staff rulings indicate that Section 6018.4 can cause a chiropractor to play two different roles when purveying such products. First, when dispensing the products in the course of rendering professional services – i.e., when it is recommended as part and parcel of the regimen of treatment that the patient take the products – the chiropractor is the consumer of the products. The chiropractor is “furnishing” the supplements within the meaning of the statute even when charging for them separately. On the other hand, when selling such products on a general basis without also rendering professional services to the purchaser, a chiropractor is treated as the retailer of those products.

A chiropractor who sells supplements, etc., at retail must obtain a seller’s permit and may then issue resale certificates. Any such chiropractor to whom M--- sells its product may purchase free of tax by issuing M--- resale certificates, otherwise M--- will have to pay tax and may collect sales tax reimbursement at the time of sale. If a chiropractor issues M--- a resale certificate which it accepts in good faith, the chiropractor will then have to pay use tax on the products consumed and sales tax on those sold at retail.

B. Licensed Acupuncturists, Licensed Nutritionists, and Massage Therapists

There is no statute classifying these practitioners as consumers rather than retailers of tangible personal property, which they furnish in the performance of their services, as there is in the case of chiropractors. As a result, we regard acupuncturists, nutritionists, and massage therapists as retailers of the products they sell. They are selling these products at retail whether or not they bill the patient separately for the products, or include the products with their services, and bill the patient in one lump sum.

As retailers they are required to obtain seller’s permits. If they do not have them already, they may obtain them from their nearest Board of Equalization field office. Once they have seller’s permits, they may issue M--- resale certificates. Until then, M--- must pay tax, and may collect sales tax reimbursement, on its sales to these practitioners.

For your information, I have enclosed a copy of Regulation 1668. 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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Enclosure: Regulation 1668