

**STATE BOARD OF EQUALIZATION**

916/445-6493

December 2, 1983

Mr. [L]
[O]
XXX Xth Street
---, CA XXXXX

S- -- XX XXXXXX

Dear Mr. [L]:

This is in response to your letter of November 7, 1983 in which you request our opinion as to the correct application of tax to your sale of medicinal herbs and medicines.

We understand that you sell Chinese medicinal herbs and medicines which are manufactured in the Peoples Republic of China and Hong Kong, and that you are not a registered pharmacist nor a licensed physician, dentist or podiatrist. These herb medicines are sold by you in tablet, powder, ointment, or liquid form. Apparently, some of your customers complain that they do not pay sales tax reimbursement when they purchase Chinese medicinal herbs and medicines from other Chinese herb stores.

Under California Sales and Use Tax Law, a sales tax is imposed on the gross receipts of any retailer from the retail sale in this state of tangible personal property, unless such sale is otherwise exempted from tax. There are two tax exemptions which could possibly apply to your sales of herbs and medicines: the exemption for "food products" sold for human consumption, and the exemption for prescription "medicines." In our opinion, however, neither of these exemptions apply to your retail sales.

Section 6359 of the Revenue and Taxation Code provides that the sale and use of food products for human consumption is not subject to tax. Although the sale of food products for human consumption is ordinarily exempt from tax, medicines are specifically excluded from the term "food products" under Section 6359. Consequently, Chinese medicines do not qualify as tax exempted "food products."

In regards to your sale of Chinese medicinal herbs, we have previously decided that herbs which are used solely for seasoning purposes qualify as exempt food products under Section 6359, provided no medicinal claims are made. Similarly, we have decided that herbal tea qualifies as an exempt food product. Since you sell "medicinal" herbs, however, we are of the opinion that your medicinal herbal products do not qualify as tax exempt "food products" as that term is used under Section 6359.

Pursuant to Section 6359 of the Revenue and Taxation Code, tax does not apply to the sale of "medicines" provided the medicinal substance or preparation qualifies as a "medicine" under Section 6359, and the medicine is sold in a specified manner by certain retailers. The retail sale of medicines is not subject to tax if the medicine is either: dispensed by a registered pharmacist on a physician's order in accordance with the law; furnished by a licensed physician, dentist or podiatrist to his own patient for treatment of the patient; or furnished by a health facility pursuant to an order of a licensed physician, dentist or podiatrist. Although your Chinese herbs and medicines may qualify as "medicines" under Section 6359, tax applies to your sale of these products, since you are not a registered pharmacist nor a licensed physician, dentist, podiatrist or health facility.

Therefore, it is our opinion that your sale of Chinese medicinal herbs and medicines is subject to tax, and that these items do not qualify as exempt food products or medicines under California Sales and Use Tax Law.

You indicate that some retailers of Chinese medicinal herbs and medicines do not charge their customers tax. The liability for the sales tax is imposed on the retailer of tangible personal property. Although he is not required to do so, a retailer of tangible personal property is authorized by law to collect sales tax reimbursement from their customers. It is possible that some retailers of Chinese herbs and medicines choose to absorb the sales tax imposed on their taxable sales of medicines rather than pass the tax onto their customers by charging them sales tax reimbursement. In any case, we shall request our --- District office to contact you for further information in regards to this possible non-compliance of the Sales and Use Tax Law.

Very truly yours,

Charles J. Graziano
Tax Counsel

CJG:ba