STATE BOARD OF EQUALIZATION

January 8, 1969

Gentlemen:

We have completed our review of the above-named taxpayer's petitions for redetermination of sales and use taxes. We have concluded that the sales tax was properly applied to the audited gross receipts from sales of meals and drugs.

With respect to the meal service, the basic contention is that petitioners were operating an institution equivalent to a hospital as defined by sales and use taxes Ruling 7. Sales and use taxes Ruling 7 provides, inter alia, that "institution" means and includes:

> "(l) Any hospital as defined in section 1401 of the Health and Safety Code, which either holds the license required pursuant to section 1400, or is exempt from the license requirement pursuant to section 1415 of that code."

Section 1401 of the Health and Safety Code defines "hospital" to include:

> "… any institution, place, building, or agency which maintains and operates organized facilities for one or more persons for the diagnosis, care, and treatment of human illness."

The petitioners were not licensed as hospitals, nor did they qualify as an institution exempt from the licensing provision by Section 1415 of the Health and Safety Code. However, our ruling is not based solely on these narrow grounds. We agree that an institution would qualify as the consumer of the meals if it was primarily engaged in the performance of the activity set forth in the above statutory definition.

We have concluded that the business activity of the petitioners was not equivalent to a hospital for the primary reason that their services were not generally offered for the care or treatment of a human illness. The petitioners' services are advertised as available to the general public. While there may have been exceptions, persons desiring to lose weight could obtain admission and undertake the weight reduction program without reference by a physician. Our California courts have held that "diagnosis" is an inseparable part of the art of healing (People v. Cochran, 56 Cal. App. 2d 394, 396L_also see People v. Jordan, 172 Cal. 391, 399, where the court concluded, "intelligent treatment may only follow correct diagnosis.") Therefore, in absence of a diagnosis by a physician that the

customer's obesity is a symptom of a human illness, we do not believe that the program offered can properly be characterized as care or treatment of a human illness.

While each applicant for admission received a review by a licensed physician, this appears to have been conducted primarily for the purpose of ascertaining if the applicant had a medical history that would make the undertaking hazardous. This included special dietary adjustments for persons having peculiar medical histories. An example of this would be, the applicant with an ulcer who was precluded from eating certain items ordinarily contained in the diet.

We have concluded that the petitioners do not otherwise qualify as an "institution" under the provisions of sales and use taxes Ruling 7 for the reason that the activity did not involve substantial services independent of the room and meal service. The underlying reason for the classification of hospitals and other institutions as consumers of meals served is that the meals are incidentally provided in connection with intensive medical care or other services related to the care of children, and aged and incompetent persons. With respect to petitioners, the meal service was not incidentally provided but was a principal part of the service offered. All reimbursement for the cost and expense of preparing and serving the meal (such as diet planning, etc.) are properly allocable to gross receipts from the meal service (See Rev. & Tax. Code § 6012).

We have obtained and reviewed the letter ruling which provided the basis for California Tax Service Annotation 1494.80, cited at the hearing as authority for the proposition that nonlicensed institutions could qualify as consumers of meals. The ruling dealt with institutions licensed as establishments providing special services for handicapped persons under the provisions of Section 1500, et seq., of the Health and Safety Code. The special services provided by these institutions includes schooling, medical advice or treatment, physiotherapy, any form of muscle training, massages, speech training, occupational therapy, vocational training and custodial care (see Health and Safety Code § 1501(a)). We believe it is clear that meal service provided in connection with the above services would be incidentally provided. Summarily, we agree with the conclusions reached by the ruling. However, we do not believe it constitutes authority for classifying petitioners as consumers of the meals. A copy of the letter ruling is enclosed for your review.

We have concluded that the drugs do not qualify for exemption because they were not prescribed or furnished for use "in the diagnosis, cure, mitigation, treatment or prevention of disease" (see paragraph B of sales and use taxes Ruling 22, copy enclosed). They also were not dispersed on a prescription filled by a registered pharmacist or furnished by a hospital as required by Section 6369 of the law and Ruling 22. Our research discloses that the authority of a hospital to purchase drugs without prescription for administration under the direction of a licensed physician is limited to licensed hospitals and county hospitals of one hundred (100) beds or less (see Business and Professions Code §§ 4047, 4052.1). Further, the authority to purchase and administer the drugs is conditional upon the hospital obtaining a permit from the State Board of Pharmacy (see Business and Professions Code § 4052.2).

In view of the above-stated conclusions, we have directed that the petitions be processed for Board action, with the recommendation that the taxes be redetermined without adjustment. Please review our letter and advise us if your clients still desire to have an oral hearing before the Board on their petitions. In the event we do not hear from you within 30 days from the date of this letter, we shall assume that such a hearing is no longer desired and will accordingly place these petitions on the Board's nonappearance calendar for its action.

Very truly yours

W. E. Burkett
Tax Counsel

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