STATE BOARD OF EQUALIZATION
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July 11, 1991

Ms. [G]
President,[J]
XXX --- ---
--- ---, -- XXXXX

RE: S- -- XX-XXXXXX

Dear Ms. [G]:

It was a pleasure making your acquaintance over the phone the other day. As you remember, the Legal Division has assigned your recent letter to the State Board of Equalization, which the Legal Division received on May 28, 1991, to me for a response. I am sorry that it has taken you so long to get an answer. I have searched our files and can find no record that we ever received your previous inquiry.

You state the background to your problem as follows:

> "I have recently started a billing service and have acquired a few small durable medical equipment companies [hereinafter "DME's"] as clients. In so doing several questions have been raised about the use and application of sales tax. Since my company is also doing some back billing for these DME's, there are also questions I will ask in reference to the sales tax in 1989."

I take the phrase "the use and application of sales tax" to mean that you are requesting advice regarding the application of sales and use tax to various sales which your clients have made. Your questions indicate that these DME's are sellers and/or lessors of various items of medical equipment. For the sake of convenience and brevity, I will set up my responses in the order in which you posed your questions and will paraphrase the passages from Pamphlet No. 45, "Hospitals," and the statutes which you quote in your letter.

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.) Likewise, Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use or other consumption in this state unless otherwise exempted from taxation by statute. The use tax is supplemental to the sales tax, and, as such, is intended to supplement the latter by imposing upon those subject to it a tax burden equivalent to the sales tax in order that tangible personal property sold or utilized in this state would be taxable once for the support of the state government. (Bank of America v. State Board of Equalization (1962 209 Cal.App.26 780, 792 [26 Cal.Rptr. 384.)

Please note that the sales tax is imposed upon the retailer for the privilege of selling tangible personal property in this state while the use tax is upon the purchaser who uses, stores, or otherwise consumes such property in this state. Pursuant to agreement, the purchaser may reimburse the retailer for its sales taxes paid (Civ. Code § 1656.1), but it is the duty of the retailer engaged in business in this state to collect the use tax from the purchaser. (Bank of America, supra, at 792-793, § 6203(a).) Thus, I assume that in each question below in which you ask should your clients "charge sales tax," you are actually asking whether or not they should collect use tax or sales tax reimbursement.

B. Tax Consequences

(1) Leases. You ask the following question:

> "Does [the duty of the lessor to collect tax from the lessee at the time the lessee makes rental payments under the lease] mean that my clients pay sales tax when they receive money from either Medi-Cal or Medicare or private insurance [hereinafter, generally, "medical insurance"] or do my clients pay sales tax for money not yet received for the leasing of medical equipment?"

The lease (or rental) of tangible personal property in California is generally a sale unless (among other exceptions) that property is leased in substantially the same form as acquired by the lessor and the lessor has paid sales tax reimbursement or use tax measured by the purchase price of the property. (Rev. & Tax. Code § 6006(g)(5), Reg. 1660.) If the lease is a sale under this definition, that lease is subject to use tax measured by rentals payable unless it is specifically exempted by statute. (Reg. 1660(c)(1). Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

Your question indicates that the leases in question are continuing sales and purchases under the above authority and that your clients are collecting from their lessees use tax at the time of each

payment and give their lessees receipts of a kind called for by Regulation 1686. Tax is thus not due until the payment is made, whether it is made by the patient or directly by medical insurance. Please note that this result is altered when the payments are made pursuant to Medicare A, as explained below:

(2) Bad Debts. Your question is as follows:

> "[A]after doing back billing in 1989, if sales tax was paid for rental medical equipment or a sale of medical equipment but is worthless and must be written off that my client can take off the sales tax they have already paid?"

As part of your question, you quote Section 6055 regarding deductions for the sales tax liability on bad debts. Section 6203.5 mirrors the language of Section 6055 to provide the same relief for use tax liability. Both sections are interpreted and implemented by Regulation 1642. I assume that you are asking how to obtain either a credit for sales tax previously paid or relief from the obligation to collect use tax in a reporting period after the period in which the sale or rental payment was charged off as uncollectible.

Regulation 1642(a) discusses this subject as follows:

> "This deduction should be taken on the return filed for the period in which the amount was found worthless and charged off [in accordance with the regulation].
>
> "Deductions taken on a return filed after the limitation period specified in Section 6902 … for claiming refunds or credits will not be allowed, but failure to take the deduction on the proper return within the limitation period will not in itself prevent the allowance of a credit or refund measured by an amount for which a retailer could have taken a timely deduction."

Section 6902 provides that the board may not approve a refund after three years from the last day of the month following the period in which an overpayment is made. We have previously concluded that the above passage permits a taxpayer to take a bad debt deduction under Regulation 1642(a) at any time prior to three years from the last day of the month following the period in which the bad debt was charged of as worthless.

As an example, if one of your clients charged off a bad debt in the fourth Quarter of 1989, he will have until January 31, 1993, to take a sales or use tax deduction under Regulation 1642 for that debt.

(3) Sales to Health Facilities. You ask the following:

> "Several of my clients service intermediate care facilities, long term care facilities, and residential care facilities. [Do the provisions of Section 6369(a)(4)] mean that my clients do not charge sales tax to these facilities on supplies used in

the treatment of patients and ordered by a physician or used in the care of patients in general?"

Section 6369 is interpreted and implemented by Regulation 1591. Assuming that the items in question are "medicines" as defined therein, then health facilities may purchase them fee of tax by giving their suppliers exemption certificates in a form substantially conforming to that set forth in Regulation 1667. (Reg. 1591(g)(3).). Some buyers may purchase intending to either re-sell the items purchased or use them in purveying their services and be unable at the time of purchase to determine which items will be re-sold and which will be used. In that case, they may purchase all of the items free of tax by giving their sellers resale certificates substantially conforming to the form set forth in Regulation 1668. The purchasers must then report and pay use tax on the taxable items which they withdraw from inventory for their own use.

Regulation 1591(g) provides that "health facilities" do not qualify for the above exemption if, among other things, they do not admit patients for periods of twenty-four hours or longer. However, under the facts of a particular purchase, the exemption may still be available under the other provisions of Regulations 1591(a).

(4) Urinary Drainage Appliances. You pose the following problem:

"My clients are in the position of serving patients in facilities, or at home, who need, and are prescribed by their physician, urinary drainage appliances, devices that are inserted directly into the urinary bladder to relieve the patient due to the inability to urinate. Do the [definition of "medicines" in Regulation 1591(b)(1) and the exemption for prosthetic devices provided by Regulation 1591(b)(5)] state that my clients are not to charge sales tax on medicines inserted into the body to assist the functioning of a natural part of the human body? Urinary drainage appliances are exempt under mammary prostheses and ostomy supplies, but states for artificial openings, does this also mean urinary meatus?

By "urinary drainage appliances" I assume you mean catheters and bags for collecting the urine with the catheter being inserted into the body either through an artificial opening or through the urethra.

Sales of appliances, devices, etc., used to test, diagnose, or administer treatment to, patients are generally taxable. However, we have previously determined that catheters and related supplies qualify as medicines either as prosthetic devices inserted through a natural opening in the body under Regulation 1591(b)(4) or as drainage devices inserted through an artificial opening in the body under Regulation 1591(j). Sales of urinary drainage appliances are thus exempt from tax.

(5) Wheelchair Cushions. You ask this question:

"Several of my clients have large amounts of wheelchairs. When a paraplegic or quadriplegic patient obtains a prescription for a wheelchair the physician often orders a special wheelchair cushion which becomes an integral part of the

> wheelchair due to the fact that the patient has no feeling below the point of damage to the spinal cord, and he will not be aware of discomfort or other signs of pressure due to decreased circulation. Since this cushion is prescribed by the physician, and is a necessary item to prevent pressure sores, do my clients charge sales tax on a integral part to that wheelchair i.e. wheelchair cushion?"

We have previously determined that wheelchair pads and cushions which are purchased separately from the wheelchair on the order of a physician to replace or supplement the basic seats that come with the chairs qualify as "replacement parts" under Regulation 1591(k). As a result, sales of these items are exempt from tax when sold to an individual under the conditions set forth in the regulation.

(6) Payments by Medical Insurance. You pose the following final question:

> "One of my clients has stated to me that Medicare and Medi-Cal often conflict on what is taxable and what is not taxable. Where does this leave my client when charging sales tax?"

The rules regarding which items are subject to tax and which are not remain the same no matter what form of medical insurance is used. However, due to the fact that under Medicare A health care providers must enter into a contract with the federal government to provide services under that program, we regard sales of tangible personal property for which payment is made under Medicare A to be sales to the United States itself. Such sales are exempt from tax under Section 6381. Sales for which payment is made under Medicare B, Medi-Cal, or private health insurance are subject to tax unless exempt pursuant to Regulation 1591.

You have copy of Pamphlet No. 45, but for your information, I have enclosed copies of Regulations 1642 and 1667, and 1668 which are not included therein. I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es