



425.0135

STATE OF CALIFORNIA

---

## STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
(916) 324-3828

January 24, 1992

Mr. REDACTED TEXT

Re: Diabetic Supplies

Dear Mr. REDACTED TEXT:

Mr. R. M. Gilbertson, San Jose District Principal Auditor, has requested that the Legal Division answer your letter to him which he received on December 4, 1991, regarding the application of sales tax to the sales of certain diabetic supplies. You have asked if insulin, insulin syringes, blood sugar monitoring machines, and disposable electronic strips use to test blood sugar level in the blood are subject to tax.

You indicate that at least one organization, the Diabetes Society of REDACTED TEXT is collecting tax reimbursement on its sales to you. You attached to your letter invoices from REDACTED TEXT and the Diabetes Society which indicate that these retailers are adding tax to their sales to you of syringes, medication, insulin, test strips, and an Exactech machine. The REDACTED TEXT invoice states that it is a registered pharmacist, but the invoices from the Diabetes Society indicate that it is not.

### 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.) "[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 a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." "Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 PO.2d 201.] The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

#### B. Prescription Medicines

Section 6369, interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591 provides that sales of medicine, when prescribed and sold or

furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(a).) Subdivision (b)(1) defines "medicine" to "mean and include any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use." However, Regulation 1591(c)(2) adds that "medicines" do not include "articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a general rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

The regulation does provide that certain items which might otherwise be considered as being devices, etc., are exempt. Regulation 1591(h) provides as follows:

“‘Insulin’ and ... ‘insulin syringes’ furnished by a registered pharmacist to a person for treatment of diabetes as directed by a physician shall be deemed to be dispensed on prescription within the meaning of Section 6369.”

#### C. Tax Consequences

Regulation 1591(h) which interprets and implements Section 6369(e), excepts only insulin and insulin syringes from the items excluded from the term “medicines” in Regulation 1591(b)(1) and then only when those items are sold by a registered pharmacist. We therefore conclude that the REDACTED TEXT Pharmacy should not have collected sales tax reimbursement from you when it sold you those items. The invoices from the Diabetes Society do not indicate that it is a registered pharmacy. Assuming that it is not your purchases of insulin and insulin syringes from it are subject to tax.

We have previously concluded, however, that blood testing equipment and related supplies other than insulin and insulin syringes do not qualify as “medicines” under Regulation 1591(b)(1), nor do they qualify under any of the other provisions of Regulation 1591. Sales of these items are subject to tax.

As noted above, exemptions from tax are strictly controlled by the language of the statute providing the exemption. The Board of Equalization, while it may adopt and enforce reasonable rules for carrying into effect the expressed purpose of a statute, is prohibited from exercising its discretion to modify, enlarge, or alter the provisions of the legislative act being administered. (Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal. 3d. 392, 426 [128 Cal.Rprt. 183, 546 P.2d 687; Am. Distilling Co. v. St. Bd. of Equalization (1942) 55 Cal.App.2d 799, 805 [131 P.2d 632].)

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

JLW:es  
4253I

bc: Mr. R. H. Gilbertson, San Jose District Principal Auditor:  
Please investigate to find out why REDACTED TEXT Pharmacy is collecting tax reimbursement on exempt sales of insulin and insulin syringes.