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March 22, 1993

REDACTED TEXT

BURTON W. OLIVER
Executive Director

Re: SR REDACTED TEXT
Medical Supplies Generally

Dear Mr. REDACTED TEXT:

I received your letter dated January 26, 1993 following up on our telephone conversation of December 22, 1992, and my previous correspondence on this subject with Mr. REDACTED TEXT of your office. As we noted, there were several items which Mr. REDACTED TEXT included on his lists on which I could not comment due to the lack of facts. You supplied additional facts and requested an opinion on those items. You also gave additional information on your client's purchasing arrangements with its customers and requested an opinion as to whether its "management fees" are includible in gross receipts and whether or not it or its customers are responsible to report and pay tax on the sales to the providers.

You asked for confirmation that the opinions that Mr. REDACTED TEXT previously received protect REDACTED TEXT for the purposes of Revenue and Taxation Code Section 6596. Such confirmation is not necessary. The opinions sent to Mr. REDACTED TEXT constitute written advice obtained pursuant to written request and apply to the facts and circumstances of the activities described in his letters.

OPINION

A. Medical Items.

I discussed the principles governing the exemption from sales and use tax for prescription medicines in my previous correspondence, copies of which you attached to your letter, and so for the sake of brevity will not repeat them here. In sum, however, for the sale or use of a medical item to be exempt from tax in California, it must qualify as a "medicine" and be sold or furnished to the consumer pursuant to prescribed methods. (See, Reg. 1591.)

1. Wheelchair Accessories and Ambulatory Aid Accessories.

You describe "wheelchair accessories" as wheelchair pads and cushions and cushion covers; wheelchair arm, leg and foot rests and straps; wheelchair tire inserts; wheelchair seat pouches and baskets; wheelchair side guards; wheelchair trays; wheelchair anti-tipping devices; wheelchair safety belts and wheelchair lock latches. Examples of "ambulatory aid accessories" were hand grips for wheelchairs, canes, walkers and crutches; tips for canes, walkers and crutches;

and crutch cushions. To qualify for the exemption, these items must be sold to an individual for the use of that individual on the direction of a licensed physician. (Reg. 1591(k).)

2. Specialty Chairs.

Examples of "specialty chairs" include specially designed chairs and recliners, shower chairs, orthopedic car seats and motorized chair seat lifts. We have previously determined that such items are devices or appliances excluded from the definition of "medicine" under Regulation 1591(c)(2). As a result the sale or use of such items in California is subject to tax.

3. Pneumatic Compression Units/Accessories.

You describe a "pneumatic compression unit/accessory" as "a glove/stocking-type of item worn by individuals with poor circulation in their hands, feet, arms or legs, to aid such circulation." We have previously determined that such items are devices or appliances excluded from the definition of "medicine" under Regulation 1591(c)(2). As a result the sale or use of such items in California is subject to tax.

4. Alternating Pressure Pads and Pumps.

You state that such items "are worn by individuals who are bedridden to avoid bedsores that result from that individual's inactivity or lack of bodily movement." We have previously determined that such items are devices or appliances excluded from the definition of "medicine" under Regulation 1591(c)(2). As a result the sale or use of such items in California is subject to tax.

5. TPN ("Total Parenteral Nutrition").

You indicate that this item is a type of liquid nutrition prescribed for tube feeders and is available only by prescription of a licensed physician. We have previously determined that such liquid nutrition is a medicine the sale or use of which under the conditions set forth in Regulation 1591(a) is exempt from tax.

6. Physical Therapy Miscellaneous.

You list as examples of miscellaneous physical therapy items braces and supports, wrist and ankle weight belts, cervical collars and pillows, infra-red heat lamps and accessories, heat/ice pads and packs, and portable (over-tub) whirlpools. Braces and supports for the body structure, including cervical collars, that are actually fully worn on the body and prescribed by a licensed physician are exempt as orthoses or prostheses. (Reg. 1591(b)(5).) Weight belts, pillows, heat lamps and accessories, heat/ice pads and packs, and portable whirlpools have all been previously determined to be devices or appliances excluded from the definition of "medicine" under Regulation 1591(c)(2). The sale or use of such items in California is thus subject to tax.

7. Respiratory Accessories.

You list "respiratory accessories" as including inspiratory muscle trainers, exhalation gas collectors, spirometers, and peak flow meters. You do not describe the use of these items and so

I cannot give an opinion on them. You must treat the sales or use of these items as subject to tax until you receive written advice stating that they are exempt.

In an appendix you stated your understanding of the tax treatment of the sales and use in California of these items. To the extent that your understanding differs from the above discussion, it is incorrect.

B. Management Fees.

You describe Homedco's relationship with its customers as follows:

"Our client enters into management agreements with various companies (i.e., providers) to provide medical equipment and supplies to the providers' customers. Enclosed is a copy of our client's management agreement for your review Under the management agreements, our client sells medical equipment and supplies to the providers for purposes of resale and obtains resale certificates from the providers. Our client delivers the items to the providers' customers and installs and sets up such items if necessary. Our client also handles customer complaints. Because our client's computer system is specifically set up to handle sales and leases of its items, our client also bills the providers' customer on behalf of the providers for the sales and rental charges due, including and applicable sales and use tax. Our client sends invoices reflecting the providers as the sellers or lessors and receives checks from the providers' customers which are made payable to the providers. These checks are deposited directly into the providers' bank account. The providers are required to register as tax collectors and remit or pay all California sales and use taxes due. Our client receives a fee for these management services from the providers."

Pursuant to Paragraph 6 of the agreement, REDACTED TEXT takes the orders directly from the physicians, delivers the property, sets it up if necessary, and provides the maintenance and servicing. It also trains the customer regarding the use and administration of the items sold. It bills the suppliers and any third-party insurers, including governmental insurers, and engages in "reasonable and appropriate collection and adjustment efforts as are necessary to collect monies" owed to the supplier. REDACTED TEXT also maintains a such inventory of the items sold "as is necessary" to be able to fill all orders within "reasonable time periods." The supplier assists REDACTED TEXT in marketing the supplier's products. (Agreement, ¶ 3.1.)

Pursuant to the agreement, REDACTED TEXT appears to be the sole contact point with the customer. The customer orders and takes delivery from, is trained by, and pays, REDACTED TEXT. When the customer has a complaint it contacts REDACTED TEXT. REDACTED TEXT collects the outstanding bills appears to have the discretion to adjust the bill. It also maintains an inventory on hand. It thus acts as if it is purchasing for its own account rather than on behalf of someone else.

As I stated in my letter of June 10, 1992, to Mr. REDACTED TEXT, two of the criteria which must exist for an agency to qualify as an agent rather than a retailer are (1) the agency clearly discloses to the supplier the name of the client for whom the agency is acting as an agent; and (2) there is written evidence of the agency relationship obtained prior to the transaction. REDACTED TEXT contracts with a supplier to represent it with potential customers generally rather than with

one specific customer. It appears that there is no written agreement between REDACTED TEXT and the provider REDACTED TEXT is purchasing on its behalf from a particular supplier. Indeed, REDACTED TEXT is required to maintain an inventory to meet reasonably anticipated needs as they arise. We thus conclude that REDACTED TEXT acts as the retailer and provides its services in the regular course of business.

Two results derive from this conclusion: (1) REDACTED TEXT must report and pay sales tax or collect use tax on its taxable sales in or for use in California; and (2) its management fees must be included in its gross receipts/selling price subject to tax. (§§ 6011(b)(1) & 6012(b)(1).)

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

bc: Hollywood District Administrator