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December 9, 1992

Ms. REDACTED TEXT
 MIS Director,
 REDACTED TEXT, Inc.
 REDACTED TEXT, CA

Re: SR REDACTED TEXT
 Medical Devices
 Orthotic Products

Dear Ms. REDACTED TEXT:

I am responding to your letter to Assistant Chief Counsel Gary J. Jugum dated October 28, 1992. You requested a ruling as to the application of sales and use tax to sales by your company (REDACTED TEXT) of certain medical products. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a given set of facts.

You indicate that REDACTED TEXT's local hospital clientele has raised questions regarding the status of sales of two of REDACTED TEXT's products. The first is a Balanced Suspension Sling. The literature you enclosed describing this item indicates that it is designed to suspend the entire leg above the patient's bed, and appears to be attached to the bed when it is in operation. The second is a Cervical Pillow which provides support to the cervical spine while the patient is lying on a bed.

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 P.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 rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as "medicines." Regulation 1591(b)(4) includes orthotic devices, or their replacements, designed to be worn on the person of the user as a brace, support, or other correction for the body structure.

C. Tax Consequences to REDACTED TEXT.

In order for the sale of an orthotic device to be exempt from tax, the device must be fully worn on the body of the patient. Devices which are also attached to other objects do not qualify. The cervical pillow is merely placed on the bed, which itself is not a medicine. (See, Reg. 1591(c)(2).) It is not attached to the patient at all. You correctly note that "slings" are designated as orthoses in Regulation 1591(b)(4), but these are arm slings and the like which are fully worn on the body of the patient. The Balanced Suspension Sling is attached to the hospital bed in which the patient is lying. Thus, these items are excluded from the definition of "medicines" under Regulation 1591(b)(4) rendering their sales subject to tax.

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: Oakland District Administrator