

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS UNIT

In the Matter of the Petition)	HEARING
for Redetermination and Claim)	DECISION AND RECOMMENDATION
for Refund Under the Sales)	
and Use Tax Law of:)	
)	
)	No. SR REDACTED TEXT
)	SR REDACTED TEXT
REDACTED TEXT)	
)	
)	
<u>Claimant/Petitioner</u>)	

The above-referenced matters came on regularly for hearing before Hearing Officer Stephen A. Ryan on August 9, 1990, in San Francisco, California.

Appearing for Claimant/ Petitioner (hereinafter "petitioner"):	None
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Mr. REDACTED TEXT, the Director of Finance of REDACTED TEXT, which is the successor corporation of petitioner following a 1988 merger, notified the Hearing Officer that no appearance would be made.

Appearing for the Department of Business Taxes:	Matt Kilroy Senior Tax Auditor
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Protested Item

The protested tax liability for the period April 1, 1984 through March 31, 1987 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Gross receipts from retail sales of non-administered supply items to patients	\$ 250,945

Petitioner paid this liability and seeks a refund.

Petitioner's Contentions

An exemption applies because these items are therapeutic in nature since they are prescribed by a physician and are necessary for the complete recovery of the patient.

Summary

Petitioner operated a hospital with a pharmacy during the audit period. The most recent prior Board audit was for the period through September 30, 19975.

The auditor informed the Hearing Officer that the specific exemption raised by petitioner during the audit is that of prescription medicines. Mr. REDACTED TEXT, petitioner's Director of Accounting, had cited Regulation 1591(b)(1) during the audit as authority for an exemption. Regulation 1503 was also discussed in meetings between petitioner and the audit staff.

In its claim, petitioner listed the following products for which it seeks an exemption for its gross receipts derived from sales: sitz bath, elevated toilet seat, eggcrate mattress, eggcrate chair pad, speci pan, speci pan midstream, literature pack (adult), literature pack (youth), ortho pillow Ruth Jackson, ortho heelbo, and sheepskin.

The auditor indicated that he believes the ortho heelbo to be the closest to being a medicine, but not a medicine. He described it as an insert inside a shoe to raise the leg. He also stated he was not sure, but thought that sheepskins were used for a person to lay on in order to prevent sores.

The auditor found that petitioner had invoiced each patient with a separate charge for these particular items.

Analysis and Conclusions

Regulation 1503(b) reads, in pertinent part, as follows:

“(2) Tax does not apply to charges made by institutions to residents or patients for meals, food products (including hot prepared food products), rooms, and services. Tax applies to charges made by institutions to residents or patients for appliances, dressings, and other supplies, except medicines subject to exemption. When a charge is made with respect to property administered to the resident or patient and no separate charge is made which is identified as a charge for the administration of the item, the charge is not taxable. The charge is deemed to include the administration of the property to the resident or patient. The institution is the consumer of the property, and tax applies with respect to the sale to the institution. For purposes of this regulation ‘administration’ requires the utilization of the services of the hospital employees, attending

physician or patient's private use, and such services must be of a technical or professional nature, such as injections or other internal applications, and applying casts, splints, dressings, and bandages. The term does not include oral applications (e.g., administering pills or liquids for swallowing) or external applications (e.g., rubbing on skin).

“When a charge is made for the property administered and a separate charge is made which is identified as a charge for the administration of the item, the institution is the retailer of the property. Tax applies to the charge for the property if not otherwise exempt, but not to the charge for the services of administration.”

Petitioner's separate charges for these items constitute taxable gross receipts from retail sales unless otherwise exempt.

Gross receipts from the sale of medicines are exempt from sales tax (Revenue and Taxation Code Section 6369(a)). “Medicines” is generally defined, in pertinent part, 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 that use.” (Rev. & Tax. Code § 6369(b).)

“Medicines” excludes articles in the nature instruments, apparatus, contrivances, appliances, devices, other mechanical equipment, and other physical articles (Rev. & Tax. § 6369(b)(2)). “Medicines” is further defined by examples of items which are generally placed inside the body or worn/carried on the body (Rev. & Tax. Code § 6369(c)(1) through (6), (f) and (g)). Specifically, they include:

“Orthotic devices, other than orthodontic devices, designed to be worn on the person of the user as a brace, support, or correction for the body structure, and replacement parts for those devices. However, orthopedic shoes and supportive devices for the foot are not exempt unless they are custom-made biomechanical foot orthoses or are an integral part of a leg brace or artificial leg. For purposes of this paragraph, ‘custom-made biomechanical foot orthoses’ means an individually prescribed foot orthosis which is custom fabricated over a neutral or near neutral subtalar joint with a pronated midtarsal joint position positive plaster model of the patient's foot, which model, when the cast is modified to support the osseous relationships of the anterior and posterior portions of the foot.”

It is our conclusion that none of these devices is a medicine. These products are not substances or preparations; most are not applied to the body in the diagnosis, cure, mitigation, treatment or prevention of disease; and they are not commonly recognized as such. The literature packs clearly do not fit the definition. They are paper for use in reading. The other items may temporarily touch the body, however, they are appliances or items more for body comfort than as a medicine as defined in the law. The ortho pillow, although carrying the name which implies that it is an orthotic device, is not a medicine because it is more of a household furnishing than an item to be "worn on the person". The ortho heelbo does not appear to be of the qualifying type of orthopedic device described in Section 6369(c)(3). Petitioner has failed to produce any evidence to show that the ortho heelbo device meets the requirements of Section 6369(c)(3). The taxpayer has the burden to prove an exemption from sales tax (see Standard Oil Co. v. State Board of Equalization (1974) 39 Cal.App.3d 765, 769, 114 Cal.Rptr. 579). The sheepskin could possibly be the closest item to meet the medicine definition. However, we are unfamiliar with its specific use. It would appear to be more of a comfort item akin to a layer on a bed to prevent sores.

Recommendation

Redetermine without adjustment. Deny the claim.

Stephen A. Ryan, Senior Staff Counsel

Date