

**STATE BOARD OF EQUALIZATION**

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January 28, 1991

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Controller, --- [E] Corporation
XXXX --- ---
P.O. Box XXXX-
---, --- --- XXXXX

Dear Mr. [T]:

I am writing this in response to your letter of November 30, 1990. You have requested an opinion as to whether or not any sales of the catheters which your company, [E] Corp. (hereinafter "[E]"), sells are exempt from sales or use tax. I understand the problem came up when [S] Hospital of [city], California requested a refund of sales tax reimbursement it had paid on the ground that the catheters were exempt from tax under Regulation 1591.

As we discussed during our telephone conversation on November 20, 1990, the majority of [E]'s catheters are used for temporary heart pacing. All of its catheters are worn in the person of the patient and act to assist the functions of the heart or to provide access to the patient's internal organs. You have included brochures describing several catheters and giving indications for the use of each.

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. State Bd. of Equalization (1974) 29 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Prescription Medicines and Catheters.

Section 6369(a) interpreted and implemented by Title 18, California Code of Regulation, Regulation 1591 (regulations are Board rulings that have the force and effect of law), provides that sales of medicines, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. The statute goes on to specifically exclude from the definition of "medicines" items in the nature of instruments, apparatus, appliances, contrivances, devices, or other equipment or article and the replacement parts thereof (Reg. 1591(c)(2).) As a general rule, then, items used to apply medicine or treatment to the patient are not considered to be medicines. Over the years, however, the Legislature has provided exceptions to that general rule.

Prior to October 1, 1977, only those catheters which were permanently (i.e., for at least six months) "implanted in the human body to assist the functioning of any natural organ, artery, vein or limb and which remained permanently or dissolved in the body" were considered exempt medicines. (§6369(c)(2); Regulation 1591(b)(2)).

Effective October 1, 1977, Revenue and Taxation Code section 6369 was amended to add:

"Mammary prostheses and any appliances and related supplies necessary as a result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste." (Section 6369(g).)

"Prosthetic devices, and replacement parts for such devices, designed to be worn on or in the person of the user to replace or assist the functioning of a natural part of the human body." Section 6369(c)(4).)

As a result of the 1977 amendments, certain drainage catheters were considered exempt medicines under Section 6369(g) because they were utilized as a result of a surgical procedure by which "an artificial opening is created in the human body for the elimination of natural waste." Certain other drainage catheters were still considered taxable because they were utilized through a "natural opening." Since 1977 several types of drainage catheters have been classified as exempt medicines even though they were utilized through a natural opening. The main requirement was that the catheters had to be worn on the person of the user or be permanently implanted. The interpretation to allow drainage catheters used as a result of a natural opening was an extension of the exemption provided to catheters in section 6369(g). As a consequence, the requirement for post-surgical use was maintained. Certain other catheters which are used for diagnostic purposes, irrigation, feeding and administration were not considered exempt under any part of section 6369 and tax applies to their sale.

In summary, sales of catheters are generally taxable, with three major exceptions: (1) catheters which are permanently implanted are exempted under section 6369(c)(2); (2) catheters which are used for drainage purposes through artificial openings are non-taxable under section

6369(g) dealing with ostomy materials (this exemption includes supplies); and (3) catheters or other types of drainage devices used for drainage through natural openings are non-taxable as prosthetic devices under section 6369(c)(4). Catheters may also be exempted if they are an integral and necessary part of another exempt item.

Prosthetics is the art or science of replacing or assisting, by artificial means, body parts that are missing or defective. (Dorland's Illustrated Medical Dictionary, 24th ed., p. 1230) In our view, while sub-section (c)(4) does not require permanent implantation, it is not intended to include devices used merely to temporarily replace or assist otherwise functional body parts during a surgical procedure or operation for either treatment or testing.

C. Tax Consequence to [E].

Based on the above authority, we conclude regarding the specific items as follows:

(1) PACEWEDGE: The brochure describes it as a "balloon flow-directed catheter which provides pulmonary artery wedge pressures and temporary pacing." This catheter may apparently be used both as a prosthesis and as a temporary assist during a surgical procedure. If [E] does not in good faith know at the time of purchase that the catheter will be used solely for a taxable purchase, then it may accept an exemption certificate. The purchaser will then owe use tax for any taxable use.

(2) OPEN TIP PACING CATHETERS: The brochure states that this item provides pacing and monitoring "during electrophysiology studies," a taxable purpose, thus disqualifying it from the exemption.

(3) CLOVERLEAF EP CATHETER: See discussion under (1) above.

(4) CLOVERLEAF CATH LABE PACING PROBE: The brochure indicates its use for "Any clinical situation requiring temporary pacemaking." See discussion under (1) above.

(5) SILICORE SEMI-FLOATER: The brochure indicates its use as follows: "Any cardiac emergency where temporary external pacemaking is needed." See discussion under (1) above.

(6) BALTHERM: The brochure indicates its use for "all procedures where myocardial performance testing is appropriate. Since its use is limited to testing, it does not come under any of the exceptions set forth above. Its sales are thus taxable.

(7) 5-IN-ONE PACE-JECTOR: The brochure indicates that this item is used to inject medication into the heart during periods when the pulse beat drops below twenty (20) beats per minute or during emergency asystole or symptomatic bradycardia. Since it is used to administer medication during emergencies, we regard it as an "appliance, etc." sales of which are taxable.

(8) EMERGENCY TRANSMYOCARDIAL PACING KIT: The brochure indicates its use as follows: "Emergency situations where cardiac electrical or sufficient blood flow is not present." See discussion under (1) above.

(9) PACEWEDGE: The brochure indicates that it provides right heart monitoring and serves as a prophylactic pacing backup during left heart studies; supplies emergency temporary pacing and medication infusion; and supplies monitoring information during a balloon insertion. It thus appears that this item is used solely during testing and administration of medicine. It thus does not qualify as an exempt medicine under the statutes cited above.

(10) BALWEDGE: The brochure indicates its use in "all procedures where myocardial performance testing is appropriate." Since its use is limited to testing, it does not qualify as an exempt medicine under the above authority.

(11) BALELECTRODE: The brochure indicates its use as follows: "Any clinical situation requiring temporary pacemaking." See discussion under (1) above.

For your reference, I have enclosed copies of Regulations 1591 and 1667. 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

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Enclosures: Regulations 1591 and 1667