

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS SECTION

In the Matter of the Petitions)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
)
Petitioner)

The Appeals conference in the above-referenced matters was held by Staff Counsel Donald L. Fillman on October 3, 1995 in REDACTED TEXT, California.

Appearing for Petitioner: REDACTED TEXT

Appearing for the
Sales and Use Tax Department: Joseph J. Cohen
District Principal Auditor

Type of Business: Retailers of prosthetic and orthotic devices.

Protested Item

The tax liability protested by petitioner for the period July 1, 1991 through December 31, 1993 is measured by:

<u>Item</u>	State, Local <u>and county</u>
Claimed exempt prescription medicine disallowed	REDACTED TEXT

The tax liability protested by petitioner for the period January 1, 1994 through June 30, 1994 is measured by:

<u>Item</u>	State, Local <u>and county</u>
Claimed exempt prescription medicine disallowed	REDACTED TEXT

Contentions of Petitioners

The Kunzli Ankle Support "looks like a boot but is in fact an ankle brace" as defined in Regulation 1591(b)(4).

Summary of Petitions

Petitioners marketed a new ankle support device known as a Kunzli Ankle Support. Petitioners state that this device is sold only for the treatment of the same ankle conditions as were formerly treated only by "ankle braces", within the definition of Regulation 1591(b)(4). No other brand of ankle brace is designed the same or looks the same as the Kunzli Ankle Support.

Most ankle braces are attached to a special shoe, but can be removed from the shoe. The Kunzli Ankle Support is designed as one piece, with the brace portion built into the shoe portion. Each Kunzli Ankle Support system is custom fitted to each patient, according to a doctor's prescription, by the use of four removable custom-moldable stabilizers.

The Kunzli Ankle Support cannot be used as a normal "shoe", even though it looks like a shoe. It is prescribed for only one function, which is to give ankle support for the same conditions for which detachable ankle braces are prescribed. They both allow forward and backward motion of the ankle, but reduce or eliminate torsion.

Petitioners state that there are several varieties and brands of ankle supports. Some clearly look like straight metal braces which are attached to special shoes. Others are inflatable, or are made from plastic and resemble a ski boot without the toes. Petitioners argue that it is not reasonable to apply tax to the sale of one ankle support, and not to another, just because of the shape or whether the toe is open or closed.

The Sales and Use Tax Department (SUTD) believes that the difference between the more traditional ankle braces and the Kunzli Ankle Support are greater than argued by petitioners. The SUTD believes that the Kunzli Ankle Support is clearly an orthopedic shoe, leaving no options but to apply the very clear wording found in Revenue and Taxation Code section 6369, and Regulation 1591. These each specify that the sale of orthopedic shoes and supportive devices for the foot are not exempt from tax unless they are (1) custom-made biomechanical foot orthoses, or (2) are an integral part of a leg brace or artificial leg. The Kunzli Ankle Support is neither.

Analysis and Conclusions

Revenue and Taxation Code section 6369(3)(A) states that the definition for "medicine" includes orthotic devices, but that

"...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."

Regulation 1591(b)(4) provides more detail, and defines a custom-made biomechanical foot orthosis as "a device which is made on a positive model of the individual patient's foot". It specifically excludes

"any pre-made or pre-molded foot orthosis...even if it has been modified or customized for an individual patient...regardless of the method of modification...." (emphasis added).

There is no argument that the Kunzli Ankle Support is an off-the-shelf, pre-made device that allows modification by customizing the four moldable stabilizers. It also appears clear to me that the device is an orthopedic shoe. However, although not raised as an issue at the conference, I considered whether a distinction can be made between the legal references to "foot" supports, and the fact that petitioners' device is an "ankle" support. In other words, did the legislature intend to exclude all. orthopedic shoes, or only those designed to support only the foot?

I have concluded that there is no evidence that the legislature intended to limit its exclusion of "orthopedic shoes" to those designed to support only the foot, and not those designed to support only the ankle. I believe that would be too narrow a reading of the statute and the regulation. The phrase "for the foot" in the statute modifies "supportive devices", not "orthopedic shoes". All orthopedic shoes are excluded from the medicine exemption, except those conforming to the two exceptions specified in the above quoted statute and regulation.

Recommendation

It is recommended that the tax be redetermined without adjustment.

Donald L. Fillman, Staff Counsel

January 11, 1996
Date