

**STATE BOARD OF EQUALIZATION**PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
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March 31, 1992

Mr. S--- R. K---
M---, W--- & ---
XXX --- --- Street
---, IL XXXXX-XXX

Dear Mr. K---:

I am writing to answer your letter to me of February 28, 1992. You have requested a ruling on the application of sales and use tax to the sales of a wide variety of medical items. Since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code Section 6596. Rather, this letter constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts. 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 hypothetical set of facts.

You attached to your letter three pages, two of which listed the items in which you are interested and one of which defined some of them. Unfortunately, the sheer number of items makes it impossible to give an itemized answer. For that reason, I will discuss general categories only. That should answer most of your questions.

OPINION**A. Prescription Medicines**

Section 6369 interpreted and implemented by title 28, California Code of Regulations, Regulation 1591 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. (Reg. 1591(a)). Subdivision (b)(1) of Regulation 1591 defines "medicines" to "mean and include any substances 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." (Regulations are Board promulgations that have the force and effect of law). As a general 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 replacement parts, designed to be worn on the person of the user as a brace, support, or other correction for the body structure. Regulation 1591(b)(5) includes prosthetic devices and their replacement parts designed to be worn on or in the person of the user to replace or assist in the functioning of a natural part of the human body. Each of the above categories is subject to certain exceptions.

In California, in order for the sale of a medicine to qualify for the above exemption, it must qualify as a "medicine" under the regulation and also be sold or furnished in the manner set forth in Regulation 1591(a). For example, sales of items such as aspirin (clearly a "medicine") are subject to tax when purchased over the counter without a prescription but exempt when sold to a medical facility which later furnishes them to its patients.

B. Special Applications

Certain items which might otherwise be taxable under the normal scheme receive special treatment.

1. Wheelchairs, Canes, Crutches, Walkers and Quad Canes.

Regulation 1591(k) interpreting and implementing Section 6369.2 provides as follows:

"Tax does not apply to sales, including leases that are "sales," of wheelchairs, crutches, quad canes, and walkers and replacement parts for these devices when sold to an individual as directed by a licensed physician."

As a result, sales of such items to a medical facility for the use of patients while there are subject to tax. However, generally the medical facility purchases a batch of crutches and cannot designate at the time of purchase which it will resell and which it will use. Under those conditions, the medical facility may purchase the whole lot free of tax by issuing your client a resale certificate conforming to the requirements of Regulation 1668. The facility will then owe use tax measured by the cost on the crutches which it self-consumes.

2. Medical Oxygen Delivery Systems.

Regulation 1591(m), interpreting and implementing Section 6369.5, provides as follows:

"Effective January 1, 1983, tax does not apply to the sale of medical oxygen delivery systems when sold, leased or rented to an individual for the personal use of that individual as directed by a licensed physician. 'Medical oxygen delivery systems' includes liquid oxygen containers, high pressure cylinders, regulators,

oxygen concentrators, tubes, masks, and related items necessary for the delivery of oxygen to the person. The term also includes repair and replacement parts for use in such a system.”

We have previously considered that in order for a piece of equipment to qualify as a medical oxygen delivery system it must deliver air or oxygen into the breathing system of the patient – e.g., CPAP’s. In general, devices that only assist the patient in breathing and do not deliver air or oxygen directly to him do not qualify.

3. Catheters.

All catheters are taxable, with three exceptions: (1) catheters which are permanently implanted are exempted under Regulation 1591(b)(2); (2) catheters which are used for drainage purposes through artificial openings are non-taxable under Section 1591(j) 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 1591(b)(5).

4. Insulin and Insulin Syringes.

Regulation 1591(h), interpreting and implementing Section 6369(e) provides as follows:

“ ‘Insulin’ and, on or after January 1, 1983, ‘insulin syringes’ furnished by a registered pharmacist to a person for treatment of diabetes as directed by a physician shall be deemed to be dispensed on prescription within the meaning of Section 6369.”

Since the statute does not mention “related supplies,” such test devices as glucose monitors and glucose test strips do not qualify for the exemption. Also, as the legislature has seen fit to exempt sales of insulin syringes only, it follows that sales of other syringes are subject to tax.

5. Ostomy Appliances and Supplies.

Under Regulation 1591(j), “... any appliances and related supplies necessary as the result of any surgical procedure by which an artificial opening is created in the human body for the elimination of natural waste, shall be deemed to be dispensed on prescription within the meaning of Section 6369.” This exemption includes “related supplies.” Therefore, sales of supplies, sold for the care of ostomy patients, are exempt from tax. Such items typically include sterile gloves, cleaning material, sterile swabs, sterile tape, and sterile drape.

6. Liquid Nutrition.

Several such products are on the market and are prescribed for “tube feeders,” that is, patients who for one reason or another cannot take food in through the mouth. We have previously concluded that such products qualify as medicines when sold or furnished under the conditions set forth in Regulation 1591(a).

7. Prosthetics and Orthotics.

In order to qualify for the exemption for sales of prosthetics, and orthotics the items must be capable of being fully worn on the patient. If the device is attached to anything other than the patient, it does not qualify. For example, traction devices attached to beds (themselves taxable appliances) do not qualify but traction devices which are fully worn on the patient do. Also, such devices must be implanted for a long term. Devices implanted for temporary use during surgery do not qualify. Items such as tracheostomy tubes fall into this category; their sales may or may not be subject to tax depending precisely on their use.

C. Role of Medicare and Medi-Cal.

Medicare reimbursement alters the above picture. If the patient's expenses are paid under Medicare A, we consider that such items have been sold to the United States, which sales are exempt from tax under Section 6381. Where the payments are made under Medicare B or Medi-Cal, the normal rules regarding exemptions apply.

D. Management Fees.

1. Factual Background.

You describe your client's arrangement with several of its customers to provide medical equipment and supplies to their customers. Unfortunately, the facts you give me are too sketchy for me to be able to render an opinion. The arrangement you describe sounds like an agreement for a "drop shipment." However, the sales and use tax consequences of drop shipments vary widely depending on where the various parties are located, on where the goods are when the sale is made, and also on if any of the retailing parties are engaged in business in California. If you need a definitive opinion, please provide more details.

For your information, I have enclosed a copy of Regulation 1591. 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
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Enclosure: Regulation 1591