



STATE BOARD OF EQUALIZATION

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February 1, 1994

BURTON W. OLIVER
Executive Director

X-----

Re: X-----

Dear X-----,

I am responding to your letter dated December 14, 1993, to Chief Counsel E.L. Sorensen, Jr. You ask for a legal opinion as to the applicability of the Sales and Use Tax Law to your company's sales of a particular line of products. You attached to your letter copies of brochures describing the products at issue. You indicate that you were assessed tax on your sales of these items during a recent audit. You have paid the assessment and have filed a Petition for Redetermination. There appears to be no issue as to the timeliness of the petition.

Each of these products is composed of a temperature sensor which is connected to a temperature monitoring system. The sensor is attached to or inserted into the patient. The Myocardial Temperature Sensor is inserted into the patient's myocardium. The Tympanic Temperature Sensor is inserted into the patient's ear canal by means of a foam cylinder. The Foley Catheter Temperature Sensor is designed for insertion into the urethra by means of a Foley Catheter. The Acoustascope Esophageal Stethoscope with temperature sensor is a disposable device which provides for "accurate measurement of core body temperature as well as transmission of heart and lung sounds" and placed in the patient's esophagus. The Esophageal/Rectal Temperature Sensor may be inserted into the rectum, esophagus, or nasopharynx, and is disposable, single-patient use only. These products appear to be designed to be in place only on a temporary basis. The Skin Temperature Sensor is affixed to the skin by means of a foam disk. Each of these products must be supplied by or on the order of a physician.

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.) Likewise,

Section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for use, storage, or other consumption in this state unless otherwise exempted from taxation by statute.

"[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. Rv. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.O.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.

Sales of durable medical equipment are thus subject to tax unless the equipment fits within a statutory exemption. There is, unfortunately, no exemption for sales of temperature sensing equipment. Since we have assumed that those sensors inserted into the patient are not intended to be permanently implanted, the exemption for sales of permanently-implanted items can not apply. (Reg. 1591(b) (2).) We thus agree with the auditor that these items are appliances or devices under Regulation 1591(c) (2). As a result, their sales are subject to tax.

For your information, I have included 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. I am by copy of this letter informing the Petitions Section of our opinion in this matter.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Enclosure: Reg. 1591

Cc: Mr. Vic Anderson, Supervisor, Petitions Section (MIC:38)