

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

April 8, 1991

Mr. A--- L---
Purchasing Manager
E--- H---
Xth Avenue & --- ---
---, California XXXXX

RE: HA -- XX-XXXXXX

Dear Mr. L---:

Your letter of February 22, 1991, to the Legal Division has been assigned to me for a response. You have asked for an opinion on the applicability of sales and use tax to E--- H---'s (hereinafter "E---") rental of medical oxygen storage tanks from U--- C---.

I. FACTUAL BACKGROUND

You describe the factual background of your problem as follows:

"For the last six months, I have been unable to persuade U--- C--- that the oxygen storage tank is an integral part of the Hospital's oxygen delivery system and is exempt from sales tax. U--- C---'s position is that the tank is rented to the Hospital but not re-rented to the end user ... therefore not tax exempt.

"The definition of the liquid oxygen storage tank appears to be germane to the question. I would define a storage cylinder as a vessel in which the content is to be used at some future time or the content is transferred into another container. The tank at E--- H--- is an active part of the oxygen delivery system, admittedly a very large container. The patient is directly hooked up to the container. Oxygen therapy is prescribed by a Physician and consequently a patient charge is made for this therapy. There would be no difference should a bedside cylinder be used."

I assume from the context that U--- C--- is actually collecting use tax measured by the receipts from E---'s rentals of the storage tanks. I assume that U--- C--- purchases the tanks from an outside supplier and fills them with medical oxygen prior to renting them to E---.

II. OpinionA. Medical Oxygen Delivery System Exemption

Section 6369.5, interpreted and implemented by Regulation 1591(m) provides as follows:

“There are exempted from [sales and use taxes] the gross receipts from the sale, and the storage, use or other consumption, in this state of any medical oxygen delivery system, including, but not limited to, liquid oxygen containers, high pressure cylinders, and regulators, when sold, leased, or rented to an individual for the personal use of that individual as directed by a physician.”

(Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

B. Containers and Labels

Section 6364, interpreted and implemented by Regulation 1589, provides, an exemption from sales and use taxes for the sale, storage, use, or other consumption in California of nonreturnable containers when sold without the contents to persons who fill the containers and sell them together with the contents; all containers if sold with exemption contents; or returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling.

D. Tax Consequences to E---

We have previously determined that oxygen storage tanks, large or small, qualify as part of a medical oxygen delivery system under Regulation 1591(m). Accordingly, the rental to E--- of a medical oxygen storage tank is exempt from tax when the tank is then sold, leased, or rented to an individual for the personal use of that individual as directed by a physician. However, to qualify for this exemption, the transaction between the hospital and the individual must constitute an actual sale, lease, or rental, as those transactions are defined under sales and use tax law. Apparently, the patient's use of the storage tanks is limited to E---'s premises. We have previously concluded, in a similar case, that the direction and control of the equipment thus never transfers to the patient. Accordingly, there can be no lease or rental of the storage tank to the patient under these conditions. Therefore, the medical oxygen delivery system exemption does not apply to U--- C---'s rentals of the storage tanks to E---.

There is a different reason why E--- should not be paying tax on these transactions. We have previously concluded that the only applicable tax on returnable gas cylinders which are purchased new and empty and filled by a lessor prior to renting them out is the tax measured by the purchase price to the lessor. The filling of the cylinders is not a use exempted by Section 6364.

Therefore, U--- C---'s purchase of the cylinders is not for the purpose of sale (here, lease) in the regular course of business, so U--- C--- may not shift the tax burden downstream to E---.

For your information, I have enclosed copies of Regulations 1589 and 1660. 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
3798I

Enclosures: Regulations 1589 and 1660

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1020 N STREET, SACRAMENTO, CALIFORNIA
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(916) 324-3828

May 3, 1991

Mr. A--- L---
Purchasing Manager
E--- H---
Xth Avenue & --- ---
---, California XXXXX

RE: HA -- XX-XXXXXX

Dear Mr. L---:

After our recent telephone conversation, I discussed the matter of E--- H---'s oxygen storage cylinders with other members of the Legal Division. Upon further review, we have determined that the advice I gave you in my letter to you on this subject dated April 8, 1991, was partially in error. My letter was written in response to your letter dated February 22, 1991, describing E--- H---'s arrangements for leasing medical oxygen storage tanks from U--- C--- and especially the fact that U--- C--- collects tax measured by the rental payments. Our opinion that the hospital's oxygen system as you described it did not qualify for the exemption from sales and use tax for sales and use, storage, or other consumption in this State of medical oxygen delivery systems (Rev. & Tax. Code § 6369.5) was correct. We must, however, modify our advice regarding the hospital's lease of the oxygen tanks from U--- C---.

I. FACTUAL BACKGROUND

Based on the additional information you supplied and our own investigation, it now appears that the gaseous oxygen storage tanks are part of a storage unit set in place on a concrete slab with a back-up storage unit for emergencies. There are two tanks which are located in an area enclosed by a fence across the street from the main hospital. The larger tank is 25-30 feet tall and about five feet in diameter. The smaller unit is about 15 feet tall with the same diameter.

The large tank has a meter indicating “inches of water” with the gauge topping out at 400 inches. It appears that the capacity is actually 300 inches which converts to approximately 673,550 cubic feet. The smaller tank tops out at about 110 inches. The oxygen can be directed to various rooms in the hospital by use of underground pipes and individual turn-on valves in patient’s rooms.

We assume from the facts, as stated in your letter, that U--- C--- is collecting tax measured by the rental payments that U--- C--- has not paid sales tax reimbursement or use tax measured by the purchase price on its purchase of the tanks. We further assume that U--- C--- purchased these tanks empty and filled them after they were installed at the hospital. (We call these gas storage tanks “vessels” in order to distinguish them from more portable gas “cylinders”.)

II. OPINION

A. Leases

The lease (or rental) of tangible personal property in California is a sale unless that property is leased in substantially the same form as acquired by the lessor and the lessor has paid sales tax reimbursement or use tax measured by the purchase price of the property. (Rev. & Tax. Code § 6006(g)(5), Reg. 1660.) If the lease is a sale under this definition, that lease is subject to use tax measured by rentals payable unless it is specifically exempted by statute. (Reg. 1660(c)(1).) Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

B. Tax Consequences to E--- H---

We have previously determined that the application of tax to leases of vessels is different from the application of tax to leases of cylinders. Although E--- H---’s vessels are no doubt “returnable”, as defined in my letter, we treat such large fixed items as “fixtures” – i.e., items which are accessory to a building or structure and do not lose their identity as accessories when installed. (Reg. 1521(a)(5).) The tax consequences of such a lease are set forth in the portion of Regulation 1660 quoted above.

Therefore, we must modify our previous advice. To the extent that it applied to cylinders, it was correct. However, in your case, U--- C--- is leasing fixtures which are defined as tangible personal property in Section 6016.3. In accordance with the regulation, it has elected to collect use tax measured by the rental payments. We regard such leases as continuing sales and purchases by the lessee subject to tax measured by the rental payments. (Reg. 1660(b)(1)(E), (b)(2), (c)(1).) As lessor, U--- C--- must collect the tax at the time E--- H--- makes the rental payments and give it a receipt of the kind called for in Regulation 1686. (Reg. 1660(c)(1).)

Please note that this advice applies only to taxation of the leases of the vessels. It does not apply to charges for the gaseous oxygen itself.

For your information, I have enclosed a copy of Board of Equalization Pamphlets No. 45, "Hospitals", and 46, "Leasing Tangible Personal Property in California". 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: Pamphlet 45
Pamphlet 46

cc: Mr. O. A. McCarty, Supervisor, Return Review